UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR
SAN DIEGO, CALIFORNIA
JULY 14 - JULY 20, 2017

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

July 9, 2018

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DRAFTING COMMITTEE ON UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following individuals:

DAVID M. ENGLISH, University of Missouri School of Law, 203 Hulston Hall, Columbia, MO 65211, *Chair*

MARY M. ACKERLY, 782 Bantam Rd., P.O. Box 815, Bantam, CT 06750-0815

WILLIAM W. BARRETT, 600 N. Emerson Ave., P.O. Box 405, Greenwood, IN 46142

SCOTT DONALDSON, Alabama Court of Civil Appeals, 300 Dexter Ave., Montgomery, AL 36104

MARC S. FEINSTEIN, 431 N. Phillips Ave., Suite 301, Sioux Falls, SD 57104-5933

LYLE W. HILLYARD, 595 S. Riverwoods Pkwy., Suite 100, Logan, UT 84321

THOMAS L. JONES, 907 Indian Hills Dr., Tuscaloosa, AL 35406-2226

PAUL M. KURTZ, 362 W. Cloverhurst Ave., Athens, GA 30606

JANICE L. PAULS, Kansas House, 101 E. 11th Ave., Hutchinson, KS 67501

WILLIAM J. QUINLAN, 233 S Wacker Dr., Suite 2210, Chicago, IL 60606-7147, Chicago, IL 60606-7147

V. LOWRY SNOW, 912 W. 1600 S., Bldg. B#200, St. George, UT 84770

KAREN R. WASHINGTON, 2214 Main St., Dallas, TX 75201

NINA A. KOHN, Syracuse University College of Law, 420 Dineen Hall, Syracuse, NY 13244, *Reporter*

EX OFFICIO

RICHARD T. CASSIDY, 1233 Shelburne Rd., Suite D5, South Burlington, VT 05403-7753, *President*

NORA WINKELMAN, Pennsylvania House of Representatives, Main Capitol Building, Room 620, Harrisburg, PA 17120, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

CATHERINE A. SEAL, P.O. Box 2682, 90 S. Cascade Ave., Suite 480, Colorado Springs, CO 80901-2882, *ABA Advisor*

CHERYL CESARIO, 1004 Washington St., Evanston, IL 60202, *ABA Section Advisor*

KRISTIN B. GLEN, City University of New York School of Law, 2 Court Sq., Long Island, NY 11101-4356, *ABA Section Advisor*

CORY KALLHEIM, 2519 Connecticut Ave. NW, Washington, DC 20008, *ABA Section Advisor*

EDDIE J. VARON LEVY, 2276 Torrence Blvd., Torrence, CA 90501-2518, *ABA Section Advisor*

LINDA WHITTON, Valparaiso University, 656 S. Greenwich St., Wesemann Hall, Valparaiso, IN 46383-4945, *ABA Section Advisor*

EXECUTIVE DIRECTOR

LIZA KARSAI, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
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UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

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UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

Prefatory Note

This act replaces the Uniform Guardianship and Protective Proceedings Act (UGPPA) which was last comprehensively revised in 1997. It may be enacted either as a free-standing act or as part of the Uniform Probate Code (UPC). States enacting the act as part of the UPC should consult Article V of the UPC for the official text of the act as conformed to the UPC's definitions and general provisions.

The act covers guardianships and conservatorships for both minors and adults, as well as protective arrangements instead of guardianship for adults and protective arrangements instead of conservatorship for both adults and minors. It consists of seven articles. Article 1 contains definitions and general provisions applicable to guardianships, conservatorships, and protective arrangements instead of guardianship and conservatorship. Article 2 governs guardianships for minors. Article 3 governs guardianships for adults. Article 4 covers conservatorships for both minors and adults. Article 5 governs protective arrangements instead of guardianship or conservatorship. Article 6 contains optional forms that can be used by persons petitioning for guardianship, conservatorship, or a protective arrangement under Article 5. It also contains a form that can be used to notify adults subject to guardianship or conservatorship of their rights. Article 7 contains an effective date provision and boilerplate provisions common to Uniform acts.

The act is the result of the work of the drafting committee, which was charged with revising the UGPPA to implement recommendations of the Third National Guardianship Summit (NGS) held in 2011. The drafting committee's work built upon two earlier versions of the act: the 1982 UGPPA which significantly advanced guardianship law by recognizing limited guardianship, and the 1997 UGPPA which further advanced the law by, among other things, adopting a functional definition of capacity and emphasizing that guardianship and conservatorship should be options of last resort. The 1982 UGPPA in turn build upon the provisions of Article V of the UPC as originally approved in 1969.

The drafting committee worked in close consultation with a broad range of participants representing numerous constituencies. In addition to the American Bar Association advisors listed above, national organizations providing significant input included AARP, The ARC, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, the National Association to Stop Guardianship Abuse, the National College of Probate Judges, the National Center for State Courts, the National Disability Rights Network, and the National Guardianship Association.

The act has three overarching aims.

First, it aims to reflect the person-centered philosophy endorsed by the NGS. The person-centered approach is evidenced in the act's updated terminology. The terms "ward" and "incapacitated person," which were rejected by the NGS as demeaning and even offensive, are

eliminated and the more precise terms "adult subject to guardianship," "minor subject to guardianship," and "individual subject to conservatorship" are used instead. The person-centered approach is also evident in new provisions requiring that individuals subject to guardianship or conservatorship be given meaningful notice of their rights and how to assert them; provisions that require involving individuals subject to guardianship and conservatorship in decisions about their lives; requirements that guardians and conservators create person-centered plans; and provisions to facilitate court monitoring of compliance with those plans.

Second, the act aims to create legal rules that advance key objectives embraced by the NGS, including respecting and protecting the rights and interests of both individuals alleged to need a guardian or conservator and individuals subject to guardianship or conservatorship. These include provisions designed to ensure that the least restrictive means are used to protect an individual alleged to need a guardianship or conservatorship, to provide better guidance to guardians and conservators, and to help courts monitor guardians and conservators.

Third, the act aims to advance rules and systems that make it easier for all persons involved in the process—whether they be petitioners, individuals subject to guardianship or conservatorship, guardians or conservators, or judges—to achieve these objectives. It does this in a number of ways. These include creating new petition requirements to ensure that judges have the information needed to make appropriate decisions; creating an option for courts to enter orders instead of guardianship or conservatorship where such less restrictive alternatives would meet a respondent's need; and offering model forms to make it easier for petitioners to seek limited appointments instead of full ones.

With these overarching objectives in mind, a number of more specific changes are likely to be particularly noteworthy to those considering the act.

First, the act includes clearer guidance to guardians and conservators, many of whom are lay people. Specifically, the act clarifies how appointees are to make decisions, including decisions about particularly fraught issues such as medical treatment and residential placement. These clarifications are consistent with the person-centered approach embraced by the act in that appointees are given specific guidance on involving the individual in decisions.

Second, the act recognizes the role of, and encourages the use of, less restrictive alternatives, including supported decision-making and single-issue court orders instead of guardianship and conservatorship. To this end, the act provides that neither guardianship nor conservatorship is appropriate where an adult's needs can be met with technological assistance or supported decision-making. It also provides for protective arrangements instead of guardianship or conservatorship; the 1997 version, by contrast, only provided for such an arrangement as an alternative to conservatorship. These alternative arrangements have the potential to reduce the extent to which individuals in need of protection are deprived of liberties. They can also reduce the time and cost associated with meeting individuals' needs. Unlike a guardianship or conservatorship, long-term monitoring and reporting will generally be unnecessary.

Third, the act expands the procedural rights for respondents with the aim of ensuring that respondents' rights are fully respected and that guardianships and conservatorships are only

imposed when less restrictive alternatives are not feasible. In expanding these protections, the act strikes a balance between the need to provide meaningful procedural rights for individuals alleged to need a guardian or conservator, and the need to avoid making the appointment process overly complex or expensive. Key revisions include narrowing the exception to the general rule that the respondent must be present at the hearing, a requirement that explicit findings be made before certain fundamental rights are removed, and the elimination of provisions that would have allowed appointment of a guardian for an adult by will or other writing without prior judicial approval.

Fourth, the act provides for enhanced monitoring of guardians and conservators to ensure that such appointees are complying with their fiduciary duties and that individuals subject to guardianship and conservatorship are protected against exploitation. One innovation in the act is to allow the court to identify people who are to be given notice of certain key changes or suspect actions, and who can therefore serve as an extra set of eyes and ears for the court. Other revisions include a provision that makes bond a default option for conservators and the addition of provisions that clarify factors relevant in determining the reasonableness of fees for guardians and conservators.

Fifth, the act provides enhanced procedural rights for individuals subject to guardianship and conservatorship. Key changes from the 1997 act include a provision that the court provide such individuals with plain-language notice of key rights, the addition of provisions for attorney representation of individuals subject to guardianship and conservatorship, greater scrutiny of the guardian or conservator's ability to charge fees to oppose the individual's efforts to alter the appointment, and additional triggers for reconsideration of an appointment.

Sixth, recognizing that individuals subject to guardianship and conservatorship benefit from visitation and communication with third parties, the act sets forth specific rights to such interactions. In recent years, some family members of individuals subject to guardianship have raised concerns that guardians have unreasonably restricted the ability of individuals subject to guardianship to receive visitors and communicate with others, and family advocates have encouraged legislative responses to address this concern. The act includes a variety of provisions addressing this concern. These include a limitation on a guardian's ability to curtail communications, visits, or interactions between an adult subject to guardianship and third parties and a requirement that a guardian prioritize residential settings that allow the individual subject to guardianship to interact with those important to the individual. In a similar vein, it establishes a default that the adult children and spouse of an adult subject to guardianship or conservatorship are entitled to notice of key events, including a change in the adult's primary residence, the adult's death, or a significant change in the adult's condition.

Seventh, the act creates a new mechanism for protecting individuals from exploitation. Section 503 of the act allows a court, without imposing a guardianship or conservatorship or ruling on the individual's abilities, to restrict access to the respondent or the respondent's property by a specified person that the court finds by clear-and-convincing evidence: (1) through fraud, coercion, duress, or the use of deception and control, caused, or attempted to cause, an action that would have resulted in financial harm to the respondent or the respondent's property; and (2) poses a serious risk of substantial financial harm to the respondent or the respondent's property.

This allows courts to create tailored orders to protect vulnerable individuals at risk of substantial exploitation even though the individual might not have the level of limitation in abilities necessary to impose a conservatorship or guardianship. At the same time, it discourages courts from imposing a guardianship or conservatorship if a limited order would meet an individual's needs.

Eighth, the act contains a variety of provisions designed to improve compliance with the act's prohibition on courts establishing a full guardianship or conservatorship if a limited guardianship or conservatorship would meet the respondent's needs. The drafting committee recognized that, despite the best efforts of previous committees, there is a lack of compliance with the prohibition even though it was included in the 1997 act. In order to facilitate compliance, the act includes a sample petition which makes it easier for a petitioner to seek a limited order. In addition, the act requires petitioners seeking a full guardianship or conservatorship to do more to justify that approach, and courts imposing a full guardianship to provide findings to support that imposition.

Ninth, the act modernizes and clarifies provisions related to minors subject to guardianship. For example, consistent with modern trends in the law, the act provides for greater involvement of minors in decisions involving them. The age of involvement for a minor has been lowered from 14 to 12, the decision-making standard for guardians now calls on them to consider the minor's views, and an attorney must be appointed for a minor in certain situations. The act also provides greater guidance to those petitioning for guardianship of a minor, to courts determining whether they have jurisdiction over guardianship for minors, and to guardians making decisions on behalf of minors. In addition, in consideration of the U.S. Supreme Court's ruling in *Troxel v. Granville*, 530 U.S. 57 (2000), the act provides greater due process protections for parents of minors

Tenth, the act contains updated provisions to govern property management for individuals subject to conservatorship. In updating property management protections, the drafting committee looked to the Uniform Prudent Investor Act and the Uniform Trust Code, among other sources of guidance.

Finally, the act has been reorganized with the aim of making it easier to understand. Ease of use is important as many of those who need to comply with its directives are not attorneys, but are family members or friends responding to urgent or unstable circumstances, or are individuals with limited resources and significant functional challenges.

UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

Comment

The title has been changed from the predecessor "Uniform Guardianship and Protective Proceedings Act" to better reflect the act's content.

Including the word "conservatorship" in the title helps clarify that the 2017 act, like prior versions, covers both guardianship, which involves making decisions about the personal affairs of another person, and conservatorship, which involves management of another person's property and financial affairs. Including the term "protective arrangement" in the title reflects the fact that the 2017 act, unlike prior versions, emphasizes the use of protective arrangements as a less restrictive alternative to guardianship or conservatorship.

By avoiding the broad term "protective proceeding," the new title signals that the 2017 act does not cover all "protective proceedings" as that phrase is often understood (e.g., it does not cover common orders used for protection from domestic violence). The predecessor act's use of the term "protective proceeding" to refer to conservatorship proceedings and proceedings for a court order authorizing a transaction only with respect to property was confusing to many.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Adult" means an individual at least [18] years of age or an emancipated individual under [18] years of age.

(2) "Adult subject to conservatorship" means an adult for whom a conservator has been appointed under this [act].

(3) "Adult subject to guardianship" means an adult for whom a guardian has been appointed under this [act].

(4) "Claim" includes a claim against an individual or conservatorship estate, whether arising in contract, tort, or otherwise.

(5) “Conservator” means a person appointed by a court to make decisions with respect to the property or financial affairs of an individual subject to conservatorship. The term includes a co-conservator.

(6) “Conservatorship estate” means the property subject to conservatorship under this [act].

(7) “Full conservatorship” means a conservatorship that grants the conservator all powers available under this [act].

(8) “Full guardianship” means a guardianship that grants the guardian all powers available under this [act].

(9) “Guardian” means a person appointed by the court to make decisions with respect to the personal affairs of an individual. The term includes a co-guardian but does not include a guardian ad litem.

(10) “Guardian ad litem” means a person appointed to inform the court about, and to represent, the needs and best interest of an individual.

(11) “Individual subject to conservatorship” means an adult or minor for whom a conservator has been appointed under this [act].

(12) “Individual subject to guardianship” means an adult or minor for whom a guardian has been appointed under this [act].

(13) “Less restrictive alternative” means an approach to meeting an individual’s needs which restricts fewer rights of the individual than would the appointment of a guardian or conservator. The term includes supported decision making, appropriate technological assistance, appointment of a representative payee, and appointment of an agent by the individual, including appointment under a [power of attorney for health care] or power of attorney for finances.

(14) “Letters of office” means a record issued by a court certifying a guardian’s or conservator’s authority to act.

(15) “Limited conservatorship” means a conservatorship that grants the conservator less than all powers available under this [act], grants powers over only certain property, or otherwise restricts the powers of the conservator.

(16) “Limited guardianship” means a guardianship that grants the guardian less than all powers available under this [act] or otherwise restricts the powers of the guardian.

(17) “Minor” means an unemancipated individual under [18] years of age.

(18) “Minor subject to conservatorship” means a minor for whom a conservator has been appointed under this [act].

(19) “Minor subject to guardianship” means a minor for whom a guardian has been appointed under this [act].

(20) “Parent” does not include an individual whose parental rights have been terminated.

(21) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(22) “Property” includes tangible and intangible property.

(23) “Protective arrangement instead of conservatorship” means a court order entered under Section 503.

(24) “Protective arrangement instead of guardianship” means a court order entered under Section 502.

(25) “Protective arrangement under [Article] 5” means a court order entered under Section 502 or 503.

(26) "Record", used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(27) "Respondent" means an individual for whom appointment of a guardian or conservator or a protective arrangement instead of guardianship or conservatorship is sought.

(28) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(29) "Standby guardian" means a person appointed by the court under Section 207.

(30) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(31) "Supported decision making" means assistance from one or more persons of an individual's choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual's wishes.

Legislative Note: *Unlike the 1997 act, this act does not use the term "incapacitated person." Because this term may be used elsewhere in an enacting state's statutory code, the state should review its other laws to determine whether conforming amendments are necessary.*

Comment

In addition to clarifying the definition of terms used in the 1997 act, the 2017 act adds several new defined terms.

The 2017 act replaces the term "ward," which was used in prior versions of the act, with the terms "minor subject to guardianship" (paragraph (19)), "adult subject to guardianship" (paragraph (3)), and "individual subject to guardianship" (paragraph (12)). This change reflects a modern understanding that the word "ward" has pejorative implications, and implements Recommendation 1.7 of the Third National Guardianship Summit that the term be avoided in

favor of person-first language. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1199 (2012). Additionally, the 2017 act replaces the term "protected person" with "adult subject to conservatorship" (paragraph (2)), "individual subject to conservatorship" (paragraph (11)), and "minor subject to conservatorship" (paragraph (18)). Similar to the replacement of the term "ward," replacing the term "protected person" implements a person-first philosophy.

The act adds a definition of "less restrictive alternative" (paragraph (13)). The term is used to describe a variety of arrangements that might meet an individual's needs without the loss of rights intrinsic to guardianship and conservatorship. Whether a particular alternative will meet the person's needs, as well as whether a particular alternative is in fact "less restrictive," will vary on a case-by-case basis.

The act also adds the term "supported decision making" (paragraph (31)). The act uses the term to apply to a variety of arrangements in which an individual is assisted by one or more persons of the individual's choosing in making and communicating decisions. These arrangements may be purely informal, or may be formalized by an agreement between the individual and the person or persons providing assistance.

Although the term "supported decision making" has received much attention in recent years, the underlying concept is not new. In other contexts, the fact that an individual may need help to make decisions, or communicate decisions, is well-recognized. Indeed, entire professions (e.g., investment advisors, admissions counselors, etc.) have developed to provide others with support in making decisions. The act thus puts assistance with decision-making in the same category as other forms of assistance individuals may require (e.g., technological assistance or the use of an interpreter) to meet their needs.

Notably, consistent with Recommendation 1.7 of the Third National Guardianship Summit, the act no longer uses the term "incapacitated person," a term used in all prior versions of the act. The term is unnecessary because the key concept from the definition in the 1997 act—the inability to meet essential requirements and to receive and evaluate information or communicate decisions—is built directly into the preconditions for the appointment of a guardian in Section 301 or a conservator in Section 401, which also spell out that a guardianship or conservatorship may be established for an adult only if the adult's needs cannot be met using less restrictive alternatives. Compare Section 301 (2017 act) with Section 102(5) (1997 act). There is no need to use the potentially offensive term as a general label for an adult subject to guardianship or conservatorship.

As under the 1997 act, the term "parent" (paragraph (20)) is defined only to the extent of excluding an individual whose parental rights have been terminated. Remaining aspects of the meaning of "parent" are left to other laws of the enacting state. A parent whose parental rights have been terminated, however, is not a parent as so defined even if the parent is allowed to inherit from the child under the enacting state's probate code.

SECTION 103. SUPPLEMENTAL PRINCIPLES OF LAW AND EQUITY

APPLICABLE. Unless displaced by a particular provision of this [act], the principles of law and equity supplement its provisions.

***Legislative Note**: If codified as part of a state's version of the UPC, the enacting state should place the section number in brackets to preserve the numbering system: [SECTION 103. RESERVED].*

Comment

This section will be needed if the act is enacted as a stand-alone act and not codified as part of a state's version of the UPC.

SECTION 104. SUBJECT-MATTER JURISDICTION.

(a) Except to the extent jurisdiction is precluded by [insert citation to Uniform Child Custody Jurisdiction and Enforcement Act], the [designate appropriate court] has jurisdiction over a guardianship for a minor domiciled or present in this state. The court has jurisdiction over a conservatorship or protective arrangement instead of conservatorship for a minor domiciled or having property in this state.

(b) The [designate appropriate court] has jurisdiction over a guardianship, conservatorship, or protective arrangement under [Article] 5 for an adult as provided in the [insert citation to Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act].

(c) After notice is given in a proceeding for a guardianship, conservatorship, or protective arrangement under [Article] 5 and until termination of the proceeding, the court in which the petition is filed has:

(1) exclusive jurisdiction to determine the need for the guardianship, conservatorship, or protective arrangement;

(2) exclusive jurisdiction to determine how property of the respondent must be managed, expended, or distributed to or for the use of the respondent, an individual who is

dependent in fact on the respondent, or other claimant;

(3) nonexclusive jurisdiction to determine the validity of a claim against the respondent or property of the respondent or a question of title concerning the property; and

(4) if a guardian or conservator is appointed, exclusive jurisdiction over issues related to administration of the guardianship or conservatorship.

(d) A court that appoints a guardian or conservator, or authorizes a protective arrangement under [Article] 5, has exclusive and continuing jurisdiction over the proceeding until the court terminates the proceeding or the appointment or protective arrangement expires by its terms.

Comment

Subsection (a) recognizes that the Uniform Child Custody Jurisdiction and Enforcement Act (1997) (UCCJEA) largely controls jurisdiction over guardianship for minors. However, the UCCJEA does not apply to proceedings involving a minor's property. Therefore, subsection (a) does grant the court jurisdiction over a conservatorship or protective arrangement for a minor domiciled or having property in the state.

Subsection (b) aligns subject matter jurisdiction for proceedings for adults with provisions found in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), which was approved in 2007 and which is codified as Article 5A of the Uniform Probate Code. As of June 2018, the UAGPPJA has been enacted in all but four states.

Subsection (c) addresses jurisdiction after the filing of a petition seeking a guardianship, conservatorship, or protective arrangement instead of guardianship or conservatorship under Article 5. Subsection (c)(1) provides that the court in which the petition is filed has exclusive jurisdiction to determine whether to order a guardianship, conservatorship, or protective arrangement under this act. Thus, if a petition seeks a guardianship, the court has exclusive jurisdiction to determine not only the need for guardianship, but also for conservatorship or a protective arrangement instead of guardianship or conservatorship. This provision gives the court the jurisdiction needed to treat a petition for a more restrictive arrangement as one for a less restrictive arrangement where that less restrictive arrangement would meet the individual's needs as set forth in Sections 301, 401, and 501.

Subsection (c)(2) likewise gives the court exclusive jurisdiction to determine how property of the respondent subject to the law of the state is to be managed, expended, or distributed to or for the use of the respondent, an individual who is dependent in fact on the respondent, or other claimant. This provision recognizes that such matters are an integral part of the legal issue

before a court in a proceeding under this act.

Pursuant to subsection (c)(3), the court has concurrent, nonexclusive jurisdiction to determine the validity of a claim against the respondent or the respondent's property, or a question of title concerning that property. Such questions are often very closely related to proceedings brought under this act, but are not so inherently bound to the proceedings as to warrant exclusive jurisdiction.

Subsection (c)(4) simply states that a court that appoints a guardian or conservator has exclusive jurisdiction over issues related to administration of the guardianship or conservatorship.

Subsection (d) clarifies that a court does not lose jurisdiction over a guardianship or conservatorship because of a change in location of the guardian or conservator, or of the individual subject to guardianship or conservatorship.

SECTION 105. TRANSFER OF PROCEEDING.

(a) This section does not apply to a guardianship or conservatorship for an adult which is subject to the transfer provisions of [insert citation to Article 3 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act].

(b) After appointment of a guardian or conservator, the court that made the appointment may transfer the proceeding to a court in another [county] in this state or another state if transfer is in the best interest of the individual subject to the guardianship or conservatorship.

(c) If a proceeding for a guardianship or conservatorship is pending in another state or a foreign country and a petition for guardianship or conservatorship for the same individual is filed in a court in this state, the court shall notify the court in the other state or foreign country and, after consultation with that court, assume or decline jurisdiction, whichever is in the best interest of the respondent.

(d) A guardian or conservator appointed in another state or country may petition the court for appointment as a guardian or conservator in this state for the same individual if jurisdiction in this state is or will be established. The appointment may be made on proof of appointment in the other state or foreign country and presentation of a certified copy of the part of the court record

in the other state or country specified by the court in this state.

(e) Notice of hearing on a petition under subsection (d), together with a copy of the petition, must be given to the respondent, if the respondent is at least 12 years of age at the time of the hearing, and to the persons that would be entitled to notice if the procedures for appointment of a guardian or conservator under this [act] were applicable. The court shall make the appointment unless it determines the appointment would not be in the best interest of the respondent.

(f) Not later than 14 days after appointment under subsection (e), the guardian or conservator shall give a copy of the order of appointment to the individual subject to guardianship or conservatorship, if the individual is at least 12 years of age, and to all persons given notice of the hearing on the petition.

Comment

This section, which is similar to Section 107 of the 1997 act, will have limited application. Transfer of proceedings for adults from one state to another are governed by the widely enacted Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), approved in 2007, which contains a detailed procedure for transferring an adult proceeding to another state. The specific provisions in this section are therefore limited to transfer of an adult proceeding to another county within the same state, and to transfers of a minor's proceeding, whether to another state or county. In the case of a guardianship for a minor under Article 2, however, the relevant states' versions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) should be consulted for additional rules on when a case may be transferred and the procedures to be used when more than one court is involved in making these determinations.

This section, and Section 106, which addresses the appropriate venue within a state for appointment of a guardian or conservator, are designed to limit forum shopping and to assist the courts in keeping track of guardianships and conservatorships. Some guardians and conservators have attempted to thwart a court's authority by moving the individual subject to guardianship or conservatorship to another county, state, or foreign country.

The standard for transferring a guardianship or protective proceeding under this section is always the best interest of the individual, and courts should use care to avoid transfers to secure a more favorable venue for other reasons. In considering whether transfer is in the best interest of an adult, the court should consider the adult's preferences, opinions, values, and actions consistent with the decision-making standards set forth in Section 313 and Section 418. In considering

whether transfer is in the best interest of a minor, the court should consider the minor's preferences consistent with the decision-making standards in Section 209 and Section 210.

Under subsection (d), a guardian or conservator appointed in another state or country may petition the court for appointment as a guardian or conservator in this state if jurisdiction is already established or will be established upon the transfer. Pursuant to Section 113, unless the court otherwise orders, notice of the hearing on the petition must be given at least 14 days before the hearing. Under subsection (e), notice to a respondent or individual subject to guardianship who is under 12 years of age is permissive.

SECTION 106. VENUE.

(a) Venue for a guardianship proceeding for a minor is in:

(1) the [county] in which the minor resides or is present at the time the proceeding commences; or

(2) the [county] in which another proceeding concerning the custody or parental rights of the minor is pending.

(b) Venue for a guardianship proceeding or protective arrangement instead of guardianship for an adult is in:

(1) the [county] in which the respondent resides;

(2) if the respondent has been admitted to an institution by court order, the [county] in which the court is located; or

(3) if the proceeding is for appointment of an emergency guardian for an adult, the [county] in which the respondent is present.

(c) Venue for a conservatorship proceeding or protective arrangement instead of conservatorship is in:

(1) the [county] in which the respondent resides, whether or not a guardian has been appointed in another [county] or other jurisdiction; or

(2) if the respondent does not reside in this state, in any [county] in which

property of the respondent is located.

(d) If proceedings under this [act] are brought in more than one [county], the court of the [county] in which the first proceeding is brought has the exclusive right to proceed unless the court determines venue is properly in another court or the interest of justice otherwise requires transfer of the proceeding.

Legislative Note: *Under this section, the reference to "county" is placed in brackets to accommodate enacting jurisdictions that use a different term for the relevant unit of local government.*

Comment

This section modifies the venue provisions for a proceeding for a minor that were found in Section 108 of the 1997 act but largely follows the provisions of the 1997 act for adult proceedings.

Under Section 108 of the 1997 act, venue for a proceeding for a minor was in the county in which the minor resides or is present at the time the proceeding commences. Subsection (a)(2), recognizing that such cases can arise out of a proceeding concerning child custody or adjudication of parental rights, provides that venue is also in the county in which that other proceeding is pending.

As set forth in Section 108 of the 1997 act, appointment of a guardian or conservator (other than an emergency guardian or conservator) for an adult may be made only by a court in the county where the individual subject to guardianship or conservatorship resides. A court in the county where the individual is currently located but is not a resident is not prohibited from acting, but such action is limited to the appointment of an emergency guardian or an emergency conservator.

The requirement that only a court in the county where the respondent resides may appoint a guardian or conservator (except in an emergency) applies when proceedings are brought in different states, and also when multiple proceedings are brought in different counties of the same state. Subsection (d) provides that when more than one proceeding is brought within a state, the first court decides where venue is appropriate. The first court should not automatically proceed; it should first decide where proper venue lies and enter an order accordingly.

SECTION 107. PRACTICE IN COURT.

(a) Except as otherwise provided in this [act], the rules of evidence and civil procedure, including rules concerning appellate review, govern a proceeding under this [act].

(b) If proceedings for a guardianship, conservatorship, or protective arrangement under [Article] 5 for the same individual are commenced or pending in the same court, the proceedings may be consolidated.

[(c) A respondent may demand a jury trial in a proceeding under this [act] on the issue whether a basis exists for appointment of a guardian or conservator.]

Legislative Note: *State laws vary with respect to whether a jury trial may be demanded in a guardianship or conservator case. States in which a jury trial may be demanded should include subsection (c).*

Comment

Subsection (a) incorporates the enacting state's rules of procedure. Subsection (b) authorizes the consolidation of multiple proceedings that are pending in the same court. It is critical that the separate proceedings be consolidated when separate petitions for guardianship and conservatorship or for a protective arrangement instead of guardianship or conservatorship are filed. Consolidation serves to protect the respondent's rights and to provide continuity and consistency.

Subsection (c) is new to this act but the section is otherwise similar to Section 109 of the 1997 act. Subsection (c) creates an option for states to give respondents the right to demand a jury trial to determine whether the basis for appointment of a guardian or conservator exists.

SECTION 108. LETTERS OF OFFICE.

(a) The court shall issue letters of office to a guardian on filing by the guardian of an acceptance of appointment.

(b) The court shall issue letters of office to a conservator on filing by the conservator of an acceptance of appointment and filing of any required bond or compliance with any other asset-protection arrangement required by the court.

(c) Limitations on the powers of a guardian or conservator or on the property subject to conservatorship must be stated on the letters of office.

(d) The court at any time may limit the powers conferred on a guardian or conservator. The court shall issue new letters of office to reflect the limitation. The court shall give notice of

the limitation to the guardian or conservator, individual subject to guardianship or conservatorship, each parent of a minor subject to guardianship or conservatorship, and any other person the court determines.

Comment

Subsection (a) requires a guardian to file an acceptance of office. Subsection (b) requires a conservator to file an acceptance of office as well as any required bond. Subsection (c) requires the court to state any limitations on the powers of the guardian or conservator in the letters of office so the limitations may be recognized and honored. Pursuant to subsection (d), a separate court order, not merely an amendment to the letters of office, is required to modify the powers of the guardian or conservator. The specific procedure for modifying the powers of a guardian or conservator is addressed elsewhere in the act. *See* Section 319 (for guardians of adults), and Section 431 (for conservatorships). Language in Section 110 of the 1997 act that required the letters of office to state whether a guardian was appointed by a court, a parent, or a spouse has been omitted because this act provides for appointment by a court only. Provisions in Sections 301 through 303 of the 1997 act that allowed for a guardianship to be established for an adult without full due process in a court of law were rejected by the drafting committee as inconsistent with adults' fundamental rights. Likewise, under the 2017 act, a guardianship for a minor may be established only pursuant to a court order. The provisions of Section 202 of the 1997 act allowing for parental appointment of a guardian without prior court review were not carried over into the 2017 act.

SECTION 109. EFFECT OF ACCEPTANCE OF APPOINTMENT. On acceptance of appointment, a guardian or conservator submits to personal jurisdiction of the court in this state in any proceeding relating to the guardianship or conservatorship.

Comment

Once the guardian or conservator accepts the appointment, the court has jurisdiction over the guardian or conservator in any proceeding relating to the guardianship or conservatorship. Regardless of where the guardian or conservator may move, jurisdiction over the guardian or conservator continues. *See* Section 104(d).

Unlike Section 111 of the 1997 act, this section does not prescribe the procedure for giving notice to a guardian or conservator, instead leaving this issue to the enacting state's rules of civil procedure.

SECTION 110. CO-GUARDIAN; CO-CONSERVATOR.

(a) The court at any time may appoint a co-guardian or co-conservator to serve

immediately or when a designated event occurs.

(b) A co-guardian or co-conservator appointed to serve immediately may act when that co-guardian or co-conservator complies with Section 108.

(c) A co-guardian or co-conservator appointed to serve when a designated event occurs may act when:

(1) the event occurs; and

(2) that co-guardian or co-conservator complies with Section 108.

(d) Unless an order of appointment under subsection (a) or subsequent order states otherwise, co-guardians or co-conservators shall make decisions jointly.

Comment

This section, new to the act, clarifies the procedure for appointing co-guardians and co-conservators and the role of such appointees. Co-appointment may be useful when the court determines that appointment of a particular person is desirable but recognizes that the person may need help in carrying out fiduciary duties, either currently or in the future. For example, the court might appoint co-conservators in a situation where an elderly parent seeks to become conservator for a developmentally disabled son (whose needs cannot be met by less restrictive alternatives), and the court determines that the parent is the person most knowledgeable about the son's needs and preferences but would benefit from help in making financial decisions, or the parent has significant health issues that may intermittently hinder the parent's ability to perform needed functions. In this situation, appointing another person as co-conservator (such as a sibling of the son) may better meet the son's needs.

Under this section, the court's appointment of a co-guardian or co-conservator need not be immediate. Rather, under subsection (c) the appointment may be made effective upon a designated future event such as a death or resignation of another co-guardian or co-conservator. However, the appointment does not take effect until the co-guardian or co-conservator meets the requirements of Section 108 by filing an acceptance of office and, if applicable, a bond.

Subsection (d) confirms that co-guardians and co-conservators must act jointly unless the court orders otherwise either at the time of original appointment or later. However, a co-guardian or co-conservator need not obtain court approval to delegate to another co-conservator as provided in Section 124.

SECTION 111. JUDICIAL APPOINTMENT OF SUCCESSOR GUARDIAN OR SUCCESSOR CONSERVATOR.

(a) The court at any time may appoint a successor guardian or successor conservator to serve immediately or when a designated event occurs.

(b) A person entitled under Section 202 or 302 to petition the court to appoint a guardian may petition the court to appoint a successor guardian. A person entitled under Section 402 to petition the court to appoint a conservator may petition the court to appoint a successor conservator.

(c) A successor guardian or successor conservator appointed to serve when a designated event occurs may act as guardian or conservator when:

(1) the event occurs; and

(2) the successor complies with Section 108.

(d) A successor guardian or successor conservator has the predecessor's powers unless otherwise provided by the court.

Comment

This section is designed to create a comprehensive and clear set of rules to govern appointment of successor guardians and conservators. It includes language previously found in Section 112 of the 1997 act.

Subsection (a) authorizes a court to appoint a successor guardian or conservator, effective either upon appointment of the original guardian or conservator or upon a future contingency. A court can also appoint a successor guardian or conservator to fill an existing or potential vacancy. However, under subsection (c) the appointment of the successor, whether immediate or upon a future event, does not take effect until the successor guardian or conservator meets the requirements of Section 108 by filing an acceptance of office and, if applicable, a bond.

The ability to appoint a guardian or conservator to act upon some specified future event can be particularly useful in situations involving adults with developmental disabilities. The initial guardian or conservator appointed will usually be a parent of the individual subject to guardianship or conservatorship. The ability to appoint a successor guardian or conservator at the time of the initial appointment can provide both the parent and the individual with assurance

that upon the parent's death someone will be available to step in and provide continuity of assistance.

The ability to appoint a successor or additional guardian to take office in the future is different from appointing a standby guardian for a minor under Article 2. Standby guardians for minors can be appointed to take office in the future even though no guardian is currently in office – usually because a parent is providing care but expects to be unable to fulfill parental duties in the foreseeable future. Under this section, only the appointment of a successor or additional guardian or conservator is allowed.

Subsection (d) clarifies that a successor guardian or conservator has all of the predecessor's powers unless otherwise provided by the court. Although the successor typically will have the same powers as the predecessor, the court may use the change of guardian or conservator to grant the successor less or more powers. Any modification of powers, particularly an expansion of powers, must comply with the procedures under Section 319 (for guardians of adults) or Section 431 (for conservatorships).

SECTION 112. EFFECT OF DEATH, REMOVAL, OR RESIGNATION OF GUARDIAN OR CONSERVATOR.

(a) Appointment of a guardian or conservator terminates on the death or removal of the guardian or conservator, or when the court under subsection (b) approves a resignation of the guardian or conservator.

(b) A guardian or conservator must petition the court to resign. The petition may include a request that the court appoint a successor. Resignation of a guardian or conservator is effective on the date the resignation is approved by the court.

(c) Death, removal, or resignation of a guardian or conservator does not affect liability for a previous act or the obligation to account for:

(1) an action taken on behalf of the individual subject to guardianship or conservatorship; or

(2) the individual's funds or other property.

Comment

A guardian or conservator may submit a resignation at any time, but pursuant to subsection (a)

the resignation is not effective until approved by the court. Subsection (b), which requires that a guardian or conservator must petition the court for permission to resign, assures that all affected parties will receive notice of the resignation.

Regardless of how the appointment ended, subsection (c) clarifies that a guardian or conservator whose appointment has ended is still liable for previous breaches of the guardian's or conservator's fiduciary duty, and still has a duty to account for property of the individual subject to guardianship or conservatorship that was within the guardian's or conservator's control. In the event of a termination of appointment due to the death of the guardian or conservator, the duty to account is normally performed by the personal representative of the estate of the deceased guardian or conservator. In the event of the removal of a guardian or conservator due to the guardian's or conservator's own limitations, the duty to account may be performed by an agent acting under a power of attorney executed by the guardian or conservator or by a guardian or conservator appointed for the former guardian or conservator.

Section 112 of the 1997 act, which included provisions paralleling those in this section, also included provisions governing the process for removing a guardian or conservator and provisions governing appointment of co-appointees and successor appointees. Provisions governing removal are now located in Section 211 (for guardians of minors), Section 318 (for guardians of adults), and Section 430 (for conservators). Provisions governing co-appointees are now in Section 110. Provisions governing successor guardians and successor conservators are now in Section 111.

SECTION 113. NOTICE OF HEARING GENERALLY.

(a) Except as otherwise provided in Sections 203, 207, 303, 403, and 505, if notice of a hearing under this [act] is required, the movant shall give notice of the date, time, and place of the hearing to the person to be notified unless otherwise ordered by the court for good cause. Except as otherwise provided in this [act], notice must be given in compliance with [insert citation to this state's rule of civil procedure] at least 14 days before the hearing.

(b) Proof of notice of a hearing under this [act] must be made before or at the hearing and filed in the proceeding.

(c) Notice of a hearing under this [act] must be in at least 16-point font, in plain language, and, to the extent feasible, in a language in which the person to be notified is proficient.

Comment

This section does not supersede specific notice requirements provided elsewhere in the act. *See*

also Sections 105(e), 114, 116, 125(d), 203, 207, 208, 211(c), 303, 311, 312(c) & (d), 314(e), 316(b), 317(d), 318(c), 319(c), 403, 412, 413(c)&(d), 414(a), 417(a)&(c), 418(m), 419(b), 420(b), 423(d), 427(b), 428(c), 430(c), 431(e), 505, and 510 for additional notice procedures that apply in specific situations. The requirement of at least 14 days' prior notice is copied from the 1982 and 1997 acts. A 14-day prior notice provision has also been part of the Uniform Probate Code, including its provisions on guardianships, conservatorships, and protective arrangements, since its inception in 1969.

Under subsection (a), notice must be given using the method of notice provided in the enacting jurisdiction's applicable rule of civil procedure. This will typically mean that notice may be provided by mail as well as by private courier, delivery service, or other methods provided in the enacting state's rules of civil procedure. However, the time limit for notice contained in subsection (a) applies, even if different from that in the state's otherwise applicable rule.

Subsection (c) requires that the notice be in plain language. Plain language is language that is easy to read and understand and that where possible uses everyday words and short sentences. Subsection (c) also adds two additional requirements. First, it specifies that the notice be in at least 16-point font. This is to increase the likelihood that individuals receiving the notice will be visually able to read it. Second, it specifies that to the extent feasible the notice be in a language in which the recipient is proficient. Although it is sufficient under this section to provide notice in a language in which the recipient is proficient and not necessarily expert, and then only to the extent feasible, best practice is to provide notice in the recipient's primary language.

The requirements in this section reflect the importance of notice of hearings under this act. Such notices play a vital role in protecting the fundamental legal rights of some of the most vulnerable members of society, by guarding against individuals being stripped of their rights when less restrictive alternatives would suffice.

Articles 2, 3, and 4 specify in detail the persons who are to receive notice of a guardianship or conservatorship proceeding. Not mentioned in these articles is federal law on consular notification, which supplements the provisions of this act. If the subject of the proceeding is a foreign national, Section 37(b) of the Vienna Convention on Consular Relations, which was ratified by the US in 1969, requires that notice of the proceeding be given promptly to the nearest consular official for the subject's country. The failure to give such notice does not invalidate the proceeding, however. Although the Vienna Convention does not expressly mention conservators, it does not appear that the Convention is intended to apply only to guardians of the person. The Convention is applicable to proceedings for the appointment of "a guardian or trustee" for a person. If not covered by the reference to "guardian," a conservator might well be covered within the term "trustee." Because the convention applies only to appointments, it does not appear that the Convention would ordinarily apply to a protective arrangement under Article 5.

SECTION 114. WAIVER OF NOTICE.

(a) Except as otherwise provided in subsection (b), a person may waive notice under this

[act] in a record signed by the person or person's attorney and filed in the proceeding.

(b) A respondent, individual subject to guardianship, individual subject to conservatorship, or individual subject to a protective arrangement under [Article] 5 may not waive notice under this [act].

Comment

This section parallels Section 114 of the 1997 act by permitting both specific and general waivers. As specified in subsection (b), under no circumstances may the respondent, individual subject to guardianship or conservatorship, or individual for whom a protective arrangement instead of guardianship or conservatorship has been ordered, waive notice. In consequence, except as ordered by the court under Section 113 for good cause, a period of at least 14 days must elapse between the date of the notice and the hearing on the relevant petition. The interval allows a respondent or individual subject to guardianship, conservatorship, or other protective arrangement enough time to arrange for legal representation at the hearing if desired. If necessary for protection of a vulnerable individual in the interim, the court can issue an emergency order under Section 208 (for an emergency guardianship for a minor), Section 312 (for an emergency guardianship for an adult), or Section 413 (for an emergency conservatorship).

SECTION 115. GUARDIAN AD LITEM. The court at any time may appoint a guardian ad litem for an individual if the court determines the individual's interest otherwise would not be adequately represented. If no conflict of interest exists, a guardian ad litem may be appointed to represent multiple individuals or interests. The guardian ad litem may not be the same individual as the attorney representing the respondent. The court shall state the duties of the guardian ad litem and the reasons for the appointment.

Comment

This section authorizes the court to appoint a guardian ad litem for an individual whose interests would not otherwise be adequately represented or adequately known to the court. Such an appointment is distinct from the appointment of an attorney for a respondent (*see* Sections 204, 305, 406, and 507) and the appointment of a visitor in a proceeding for an adult respondent (*see* Sections 304, 405, and 506). The appointment of a guardian ad litem for an adult respondent is therefore not typical and is not required for any proceeding under the act.

It is important that the court, when appointing a guardian ad litem, advise the guardian ad litem of his or her role. This section encourages such advice by requiring the court to state the duties of the guardian ad litem and its reasons for the appointment.

The section adds language not present in Section 115 of the 1997 act and the counterpart provision of even earlier versions of the act clarifying that the guardian ad litem may not be the same individual as the attorney representing a respondent. A similar statement was included in the comments to, but not text of Section 115 of the 1997 act. The role of the guardian ad litem is distinct from that of the attorney for a respondent, and the two often may be in conflict. The guardian ad litem typically is tasked with identifying and representing an individual's best interest. By contrast, an attorney for a respondent is tasked with advocating for the individual's wishes to the extent ascertainable (*see* Sections 204, 305, 406, and 507). Appointing the same person to take on both roles is thus incompatible with due process and does not advance the court's interest in fact-finding.

When appointing a guardian ad litem who is an attorney, the court should avoid appointing an attorney who is associated with a firm in which another attorney represents a party to the proceeding (e.g. the respondent or the petitioner). Such appointments can create a conflict of interest and may be proscribed by the jurisdiction's rules of professional responsibility.

This act does not address payment for a guardian ad litem because that topic is ordinarily addressed elsewhere in state law.

SECTION 116. REQUEST FOR NOTICE.

(a) A person may file with the court a request for notice under this [act] if the person is:

(1) not otherwise entitled to notice; and

(2) interested in the welfare of a respondent, individual subject to guardianship or conservatorship, or individual subject to a protective arrangement under [Article] 5.

(b) A request under subsection (a) must include a statement showing the interest of the person making the request and the address of the person or an attorney for the person to whom notice is to be given.

(c) If the court approves a request under subsection (a), the court shall give notice of the approval to the guardian or conservator, if one has been appointed, or the respondent if no guardian or conservator has been appointed.

Comment

Subsection (a) authorizes a person not otherwise entitled to notice to file a request for notice if the person has an interest in the welfare of the respondent, or individual subject to guardianship, conservatorship, or a protective arrangement instead of guardianship or conservatorship. For a

request for notice under this section to be effective, subsection (b) requires that the request include a statement of the person's interest. Section 116 of the 1997 act had provided that an "interested person" could file a request for notice and that a government agency paying or planning to pay benefits is an interested person. The revision changes "interested person" to "person interested in the welfare" of the relevant person and deletes the reference to a government agency. This change is because a government agency should only be considered an interested person as to certain issues (e.g., financial exploitation by a third party that involves benefits paid by the agency) and should not be considered an interested person in all proceedings under this act.

Subsection (c) requires that the court give notice of the court's approval of a request for notice to the guardian or conservator. Unlike Section 116 of the 1997 act, subsection (c) then continues by requiring that notice of the approval be given to the respondent if no guardian or conservator has been appointed. Whether a particular person is considered a person interested in the welfare of the subject of a proceeding must be determined in light of the issues involved in the proceeding. In a proceeding regarding management of property, for example, the category might include a creditor, secured or otherwise, or a government agency paying benefits to the individual who is the subject of the proceeding. Under certain circumstances, it could also include a member of the media or a "watch-dog" agency.

SECTION 117. DISCLOSURE OF BANKRUPTCY OR CRIMINAL HISTORY.

(a) Before accepting appointment as a guardian or conservator, a person shall disclose to the court whether the person:

(1) is or has been a debtor in a bankruptcy, insolvency, or receivership proceeding; or

(2) been convicted of:

(A) a felony;

(B) a crime involving dishonesty, neglect, violence, or use of physical force; or

(C) other crime relevant to the functions the individual would assume as guardian or conservator.

(b) A guardian or conservator that engages or anticipates engaging an agent the guardian or conservator knows has been convicted of a felony, a crime involving dishonesty, neglect,

violence, or use of physical force, or other crime relevant to the functions the agent is being engaged to perform promptly shall disclose that knowledge to the court.

(c) If a conservator engages or anticipates engaging an agent to manage finances of the individual subject to conservatorship and knows the agent is or has been a debtor in a bankruptcy, insolvency, or receivership proceeding, the conservator promptly shall disclose that knowledge to the court.

Comment

This section, which is new to this act, creates an affirmative duty for a person to disclose to the court whether the person has been the subject of a bankruptcy, insolvency, or receivership proceeding, convicted of a felony, or convicted of a crime involving dishonesty, neglect, violence, or use of physical force prior to being appointed as a guardian or conservator. Such disclosures help ensure that the court has adequate information to determine whom to appoint, what bond or alternative asset protection arrangement to impose, and what other monitoring provisions may be appropriate. In states that require background checks for potential appointees, such disclosures may be redundant in many cases. Even in those states, however, compliance with these provisions may provide the court with relevant information that otherwise would not come to the court's attention.

The disclosure of a bankruptcy or criminal conviction is not disqualifying. A close relative may be the most qualified candidate to serve as a guardian or conservator despite such a disclosure. When considering appointment of a person who made a disclosure under this section, the court should take into account the period of time elapsed since the bankruptcy or conviction, the severity of the offense, subsequent behavior, and any other relevant factor.

Subsections (b) and (c) also create an affirmative duty for a guardian or conservator to disclose the use of, or plans to use, an agent whom the guardian or conservator knows has been the subject of a bankruptcy proceeding, convicted of a felony, or convicted of a crime involving dishonesty. Such disclosures can help the court monitor and guide the guardian or conservator.

SECTION 118. MULTIPLE NOMINATIONS. If a respondent or other person makes more than one nomination of a guardian or conservator, the latest in time governs.

Comment

The most recent appointment or nomination of a guardian or conservator is the one with the most recent date during the period when the respondent had the ability to make the appointment or nomination. If the most recent appointment is determined invalid, the prior appointment would control. This section is identical to Section 117 of the 1997 act.

SECTION 119. COMPENSATION AND EXPENSES; IN GENERAL.

(a) Unless otherwise compensated or reimbursed, an attorney for a respondent in a proceeding under this [act] is entitled to reasonable compensation for services and reimbursement of reasonable expenses from the property of the respondent.

(b) Unless otherwise compensated or reimbursed, an attorney or other person whose services resulted in an order beneficial to an individual subject to guardianship or conservatorship or for whom a protective arrangement under [Article] 5 was ordered is entitled to reasonable compensation for services and reimbursement of reasonable expenses from the property of the individual.

(c) The court must approve compensation and expenses payable under this section before payment. Approval is not required before a service is provided or an expense is incurred.

(d) If the court dismisses a petition under this [act] and determines the petition was filed in bad faith, the court may assess the cost of any court-ordered professional evaluation or [visitor] against the petitioner.

Comment

Subsection (a) provides that an attorney for a respondent is entitled to reasonable compensation and reimbursement of reasonable expenses. Thus, reasonable compensation is due to an attorney who defends against an appointment even if the court ultimately determines that the appointment is proper.

Subsections (b) and (c) provide for compensation and reimbursement of expenses for an attorney or other person whose services resulted in an order beneficial to an individual subject to guardianship, conservatorship, or a protective arrangement instead of guardianship or conservatorship. The compensation must be approved by the court, but no approval is required before the services are provided. Such compensation, especially of attorneys, is important to ensure access to counsel for those seeking to restore rights. *See* Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Ethics and Legality of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 603 (2016) ("having the right to directly challenge the continued necessity or terms of the guardianship, including who serves as guardian, is virtually meaningless without the accompanying right to legal representation."). Attorneys' concerns about payment for their services are a significant barrier to attorneys accepting representation of

individuals subject to guardianship or conservatorship. *See* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L. J. 83, 102 (2015).

Subsection (d) allows the court to assess certain costs against a person who, in bad faith, unsuccessfully petitions for appointment of a guardian or conservator. This provision aims to reduce the cost, including the cost to the state, caused by those who might abuse the system.

Section 417 of the 1997 act provided for reasonable compensation of guardians, conservators, and attorneys, but did not address many of the issues addressed in Sections 119 and 120 of this act.

SECTION 120. COMPENSATION OF GUARDIAN OR CONSERVATOR.

(a) Subject to court approval, a guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, clothing, and other appropriate expenses advanced for the benefit of the individual subject to guardianship. If a conservator, other than the guardian or a person affiliated with the guardian, is appointed for the individual, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without court approval.

(b) Subject to court approval, a conservator is entitled to reasonable compensation for services and reimbursement for appropriate expenses from the property of the individual subject to conservatorship.

(c) In determining reasonable compensation for a guardian or conservator, the court, or a conservator in determining reasonable compensation for a guardian as provided in subsection (a), shall consider:

(1) the necessity and quality of the services provided;

(2) the experience, training, professional standing, and skills of the guardian or conservator;

(3) the difficulty of the services performed, including the degree of skill and care required;

(4) the conditions and circumstances under which a service was performed, including whether the service was provided outside regular business hours or under dangerous or extraordinary conditions;

(5) the effect of the services on the individual subject to guardianship or conservatorship;

(6) the extent to which the services provided were or were not consistent with the guardian's plan under Section 316 or conservator's plan under Section 419; and

(7) the fees customarily paid to a person that performs a like service in the community.

(d) A guardian or conservator need not use personal funds of the guardian or conservator for the expenses of the individual subject to guardianship or conservatorship.

(e) If an individual subject to guardianship or conservatorship seeks to modify or terminate the guardianship or conservatorship or remove the guardian or conservator, the court may order compensation to the guardian or conservator for time spent opposing modification, termination, or removal only to the extent the court determines the opposition was reasonably necessary to protect the interest of the individual subject to guardianship or conservatorship.

Comment

Subsections (a) and (b) provide that guardians and conservators are entitled to reasonable compensation, subject to court approval or, in the case of a guardian who is not also the conservator, with the approval of the conservator. Although compensation may come from the funds of the individual subject to guardianship or conservatorship, it need not be so. For example, public funds may be used to pay guardians or conservators if the individual subject to guardianship or conservatorship does not have sufficient resources.

Subsection (c) sets forth factors for the court to consider in determining reasonable compensation. This subsection reflects recommendations made by the Third National Guardianship Summit. *See Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1201-1202 (2012) (especially Recommendation 3.2). It also reflects Standard 22 of the 2013 National Guardianship Association Standards of

Practice.

The factor listed in subsection (c)(7)—the fees customarily paid to persons who perform like services in the community—is responsive to concerns about attorneys serving as guardian or conservator unreasonably charging their standard hourly rates as attorney for all services performed as guardian. Pursuant to subsection (c)(7), when an attorney who serves as guardian or conservator performs a function that does not require or benefit from legal expertise, the hourly fee generally should be lower. For example, attorneys generally should not receive their standard hourly rate to accompany an individual subject to guardianship on a routine personal care appointment or to grocery shop for the individual.

Subsection (d) states that guardians and conservators are not required to use their personal funds to cover expenses of those for whom they are appointed.

Subsection (e) provides that if a minor or adult subject to guardianship or conservatorship seeks court intervention to modify or terminate the guardianship or conservatorship (under Section 319 or 431) or to remove the guardian or conservator, the guardian or conservator may be compensated only for time spent opposing such effort to the extent that the court has determined that the involvement or opposition is or was reasonably necessary to protect the interest of the individual subject to guardianship or conservatorship. Subsection (e) is designed to address concerns about guardians and conservators inappropriately opposing an individual who is seeking to restore rights. In such situations, the guardian or conservator may have a conflict of interest as successful opposition will preserve the guardian's or conservator's control and continuation of fees. In formulating this approach, the drafting committee considered Colorado Revised Statutes §15-14-318, which prohibits a guardian or conservator from taking any action to oppose or interfere in the termination proceeding initiated by the individual subject to guardianship or conservatorship with the exception that the guardian or conservator may file a written report with the court or seek instruction from the court on any matter relevant to the termination proceeding. The drafting committee declined to adopt the Colorado approach in part because of concerns that it would limit the ability of guardians and conservators to provide useful information to the court, and could prevent the guardian or conservator from assisting with restoration of rights in situations where such assistance would be consistent with the guardian or conservator's fiduciary duty.

Section 417 of the 1997 act provided for reasonable compensation of guardians, conservators, and attorneys, but did not address many of the issues addressed in Sections 119 and 120 of this act.

SECTION 121. LIABILITY OF GUARDIAN OR CONSERVATOR FOR ACT OF INDIVIDUAL SUBJECT TO GUARDIANSHIP OR CONSERVATORSHIP. A guardian or conservator is not personally liable to another person solely because of the guardianship or conservatorship for an act or omission of the individual subject to guardianship or

conservatorship.

Comment

As this new section indicates, appointment as a guardian or conservator does not itself cause the appointee to assume personal liability for acts of the individual subject to guardianship or conservatorship. However, the section does not preclude a guardian or conservator from being held personally liable for acts of the individual subject to guardianship or conservatorship if those acts are caused by the appointee's negligence or breach of fiduciary duty.

SECTION 122. PETITION AFTER APPOINTMENT FOR INSTRUCTION OR RATIFICATION.

(a) A guardian or conservator may petition the court for instruction concerning fiduciary responsibility or ratification of a particular act related to the guardianship or conservatorship.

(b) On notice and hearing on a petition under subsection (a), the court may give an instruction and issue an appropriate order.

Comment

This section expands the authority to petition for instructions, which under Section 414(b)-(c) of the 1997 act applied only to conservators. This section provides an opportunity for both guardians and conservators to obtain guidance from the court before acting, and to have an act ratified by the court after it is done. While petitions for instructions are common in many jurisdictions even absent statutory authorization, the enactment of this section will leave no doubt about the availability of the procedure.

Petitioning for an instruction may be useful when guardians or conservators are uncertain as to whether a particular act falls within their existing authority. Petitioning for an instruction or for ratification may be useful when guardians or conservators are concerned about another person subsequently challenging the propriety of a particular action and seek an instruction or ratification to clarify that the action falls within their authority.

SECTION 123. THIRD-PARTY ACCEPTANCE OF AUTHORITY OF GUARDIAN OR CONSERVATOR.

(a) A person must not recognize the authority of a guardian or conservator to act on behalf of an individual subject to guardianship or conservatorship if:

(1) the person has actual knowledge or a reasonable belief that the letters of office

of the guardian or conservator are invalid or the conservator or guardian is exceeding or improperly exercising authority granted by the court; or

(2) the person has actual knowledge that the individual subject to guardianship or conservatorship is subject to physical or financial abuse, neglect, exploitation, or abandonment by the guardian or conservator or a person acting for or with the guardian or conservator.

(b) A person may refuse to recognize the authority of a guardian or conservator to act on behalf of an individual subject to guardianship or conservatorship if:

(1) the guardian's or conservator's proposed action would be inconsistent with this [act]; or

(2) the person makes, or has actual knowledge that another person has made, a report to the [government agency providing protective services to adults or children] stating a good-faith belief that the individual subject to guardianship or conservatorship is subject to physical or financial abuse, neglect, exploitation, or abandonment by the guardian or conservator or a person acting for or with the guardian or conservator.

(c) A person that refuses to accept the authority of a guardian or conservator in accordance with subsection (b) may report the refusal and the reason for refusal to the court. The court on receiving the report shall consider whether removal of the guardian or conservator or other action is appropriate.

(d) A guardian or conservator may petition the court to require a third party to accept a decision made by the guardian or conservator on behalf of the individual subject to guardianship or conservatorship.

Comment

This section is new to the act. Subsection (a) specifies when a third party *must* refuse to accept the authority of a guardian or conservator. The exception is deliberately narrow. Refusal is

mandatory only when there is knowledge or a reasonable belief that the appointee lacks authority to act in the particular way the appointee is attempting to act, or the person has actual knowledge that the appointee or someone acting with or for the appointee has abused, neglected, exploited, or abandoned the individual subject to guardianship or conservatorship.

Subsection (b) states the circumstances under which a third party *may* refuse to accept the authority of a guardian or conservator. It permits refusal if the appointee's action would be inconsistent with the act itself, or in certain situations in which a report of mistreatment has been made to the appropriate governmental agency. In the case of minors this will typically be a child protective services agency; in the case of adults, it will typically be an adult protective services agency.

Subsection (c) provides a mechanism for a person who has refused to accept the authority of a guardian or conservator to report the refusal and the underlying concern to the court. On receiving such a report, the court must consider whether removal of the appointee or other corrective action is appropriate.

Subsection (d) provides an appointee with a mechanism for requiring a third party to recognize the appointee's lawful authority. Subsection (d) is responsive to concerns about third parties refusing to accept the authority of a duly appointed guardian or conservator, thus frustrating the underlying purpose of the appointment and preventing the guardian or conservator from acting in the interest of the individual subject to guardianship or conservatorship.

SECTION 124. USE OF AGENT BY GUARDIAN OR CONSERVATOR.

(a) Except as otherwise provided in subsection (c), a guardian or conservator may delegate a power to an agent which a prudent guardian or conservator of comparable skills could delegate prudently under the circumstances if the delegation is consistent with the guardian's or conservator's fiduciary duties and the guardian's plan under Section 316 or conservator's plan under Section 419.

(b) In delegating a power under subsection (a), the guardian or conservator shall exercise reasonable care, skill, and caution in:

(1) selecting the agent;

(2) establishing the scope and terms of the agent's work in accordance with the guardian's plan under Section 316 or conservator's plan under Section 419;

(3) monitoring the agent's performance and compliance with the

delegation; and

(4) redressing an act or omission of the agent which would constitute a breach of the guardian's or conservator's duties if done by the guardian or conservator.

(c) A guardian or conservator may not delegate all powers to an agent.

(d) In performing a power delegated under this section, an agent shall:

(1) exercise reasonable care to comply with the terms of the delegation and use reasonable care in the performance of the power; and

(2) if the guardian or conservator has delegated to the agent the power to make a decision on behalf of the individual subject to guardianship or conservatorship, use the same decision-making standard the guardian or conservator would be required to use.

(e) By accepting a delegation of a power under subsection (a) from a guardian or conservator, an agent submits to the personal jurisdiction of the courts of this state in an action involving the agent's performance as agent.

(f) A guardian or conservator that delegates and monitors a power in compliance with this section is not liable for the decision, act, or omission of the agent.

Comment

This section is new to the act. Subsection (a) sets forth general parameters for when a guardian or conservator may delegate a power to an agent. Agents include, but are not limited to, professionals such as attorneys and accountants who assist the appointee in the performance of duties. As a general matter, delegation may be proper and even desirable in situations where the agent's abilities or expertise will allow the guardian or conservator to better meet the needs of the individual subject to guardianship or conservatorship. This may be for a variety of reasons, including because the use of agents will be more economical (e.g., a guardian employs a third-party with a lower hourly rate than the guardian to do grocery shopping for the individual) or the agent has expertise or skills that will help the appointee act or make decisions on behalf of the individual (e.g., a guardian employs an attorney to represent the individual in a claim against a third party or a conservator employs an investment advisor to assist in the management of a large conservatorship estate).

As provided in subsection (c), a guardian or conservator may not delegate all powers to an agent.

As noted in subsection (a), the powers a guardian or conservator may delegate will depend on the circumstances. A prudent guardian or conservator may reasonably decide to delegate certain tasks to an agent where those tasks require a level or type of expertise the agent has, but the guardian or conservator does not have. For example, a conservator might delegate certain investment decisions to a professional money manager. Similarly, delegation may be prudent where it will reduce the cost of services to the individual subject to guardianship or conservatorship. For example, a prudent attorney appointed as a guardian must prudently delegate responsibility for performing grocery shopping to someone with a much lower hourly fee.

At a minimum, and as subsections (b) and (f) indicate, the guardian or conservator may not delegate the duty to monitor the agent to ensure the agent meets the needs of the individual subject to guardianship or conservatorship in a matter that is consistent with this act and with the guardian or conservator's underlying fiduciary duty. Failure to properly monitor the agent may result in the guardian's or conservator's liability for the agent's wrongful conduct. Thus, as a general matter, a prudent guardian or conservator should not delegate visitation with the individual subject to guardianship or conservatorship.

Delegation does not mean the guardian or conservator may abdicate all responsibility with respect to the agent's actions. In addition to the obligation to monitor the agent, subsection (b) requires that a guardian or conservator must exercise reasonable care, skill and caution in selecting the agent and in establishing the scope and terms of the agent's work in accordance with the guardian's plan under Section 316 or conservator's plan under Section 419.

Subsection (d) is designed to make it clear not only that agents must use reasonable care, but also that agents to whom are delegated any decision-making powers must use the same decision-making standard that applies to the guardian or conservator.

Much of this section is derived from Section 9 of the Uniform Prudent Investor Act (identical to Section 807 of the Uniform Trust Code) and Section 80 of the Restatement (Third) of Trusts (2007) but clarifying language has been added and the section has otherwise been adapted to better match the fiduciary responsibilities of guardians and conservators. Differences between this section and Section 9 of the Uniform Prudent Investor Act include: (1) subsection (a) of this section clarifies that the delegation must be consistent with both fiduciary duties and the guardianship or conservatorship plan; (2) subsection (b)(4) adds that a guardian or conservator must redress an act or omission of an agent that would constitute a breach of fiduciary duty if done by the guardian or conservator; (3) subsection (c) provides that a guardian or conservator may not delegate all powers, and (4) subsection (d)(2) adds that an agent who makes a decision on behalf of an individual subject to guardianship and conservatorship must use the same decision-making standard that the guardian or conservator would be required to use.

SECTION 125. TEMPORARY SUBSTITUTE GUARDIAN OR CONSERVATOR.

(a) The court may appoint a temporary substitute guardian for an individual subject to guardianship for a period not exceeding six months if:

(1) a proceeding to remove a guardian for the individual is pending; or

(2) the court finds a guardian is not effectively performing the guardian's duties and the welfare of the individual requires immediate action.

(b) The court may appoint a temporary substitute conservator for an individual subject to conservatorship for a period not exceeding six months if:

(1) a proceeding to remove a conservator for the individual is pending; or

(2) the court finds that a conservator for the individual is not effectively performing the conservator's duties and the welfare of the individual or the conservatorship estate requires immediate action.

(c) Except as otherwise ordered by the court, a temporary substitute guardian or temporary substitute conservator appointed under this section has the powers stated in the order of appointment of the guardian or conservator. The authority of the existing guardian or conservator is suspended for as long as the temporary substitute guardian or conservator has authority.

(d) The court shall give notice of appointment of a temporary substitute guardian or temporary substitute conservator, not later than [five] days after the appointment, to:

(1) the individual subject to guardianship or conservatorship;

(2) the affected guardian or conservator; and

(3) in the case of a minor, each parent of the minor and any person currently having care or custody of the minor.

(e) The court may remove a temporary substitute guardian or temporary substitute conservator at any time. The temporary substitute guardian or temporary substitute conservator shall make any report the court requires.

Comment

The procedure in this section can be used when a guardian or conservator has been appointed, but a proceeding to remove that appointee is pending or the appointee is not effectively discharging the functions of the office. The role of the temporary substitute guardian or conservator, as the name implies, is to fill in for the regular guardian, whose powers are suspended for the duration of the appointment. As provided in subsection (a)(2), an appointment under this section is limited to situations in which the individual's welfare requires immediate action.

A temporary substitute guardian or conservator differs from an emergency guardian or conservator. An emergency guardian or conservator is appointed in an urgent situation in which there is no guardian or conservator but the needs of the individual demand action be taken. A temporary substitute guardian also differs from a standby guardian. A standby guardian is appointed under Section 207 to serve at some point in the future, most commonly upon the death of the parent of a minor. A temporary substitute guardian, by contrast, is granted immediate authority. Likewise, a temporary substitute guardian or conservator differs from a successor guardian or successor conservator appointed under Section 111 in that the authority of the previously appointed guardian or conservator is merely suspended, not terminated, and the authority of the temporary substitute guardian or temporary substitute conservator is immediate.

This section builds on language in Section 313 of the 1997 act, which also allowed for appointment of a temporary substitute guardian. The 2017 act extends the general approach of former Section 313 to guardianships over minors as well as to conservatorships – hence the relocation into Article 1. This extension reflects a recognition that the need for someone to fill-in can arise in the context of both guardianships and conservatorships, whether the individual subject to guardianship or conservatorship is an adult or a minor. Moreover, creating a mechanism for another person to assume responsibilities reduces the barriers to removing a guardian or conservator when doing so is appropriate.

If, at the end of the six months, the individual still needs a guardian or conservator, the court should appoint a regular guardian or conservator. A temporary substitute guardian does not automatically have preference to be appointed as guardian or conservator in such cases.

In some cases, circumstances may dictate the appointment of the temporary substitute guardian without prior notice being given to the guardian or conservator, or the individual subject to guardianship or conservatorship. If that occurs, subsection (d) requires the court to inform both expeditiously. In addition, where the individual subject to guardianship or conservatorship is a minor, the minor's parents must be provided with notice. Notice to the regularly-appointed guardians and conservators is essential to ensure they know their authority has been suspended. Enacting states are free to enact a notice period of less than five days but are encouraged to not enact a notice period of more than five days.

SECTION 126. REGISTRATION OF ORDER; EFFECT

(a) If a guardian has been appointed in another state for an individual, and a petition for

guardianship for the individual is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court, may register the guardianship order in this state by filing as a foreign judgment, in a court of an appropriate [county] of this state, certified copies of the order and letters of office.

(b) If a conservator has been appointed in another state for an individual, and a petition for conservatorship for the individual is not pending in this state, the conservator appointed for the individual in the other state, after giving notice to the appointing court, may register the conservatorship in this state by filing as a foreign judgment, in a court of a [county] in which property belonging to the individual subject to conservatorship is located, certified copies of the order of conservatorship, letters of office, and any bond or other asset-protection arrangement required by the court.

(c) On registration under this section of a guardianship or conservatorship order from another state, the guardian or conservator may exercise in this state all powers authorized in the order except as prohibited by this [act] and law of this state other than this [act]. If the guardian or conservator is not a resident of this state, the guardian or conservator may maintain an action or proceeding in this state subject to any condition imposed by this state on an action or proceeding by a nonresident party.

(d) The court may grant any relief available under this [act] and law of this state other than this [act] to enforce an order registered under this section.

Comment

Subsections (a) and (b) parallel Sections 432 and 433 of the 1997 act as revised in 2010 to incorporate Section 401 and Section 402 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) (UAGPPJA). However, unlike the UAGPPJA, which applies only to adult proceedings, this section also applies to minors. As stated in the General Comment to UAGPPJA Article 4, these provisions are designed to facilitate the enforcement of guardianship and protective orders in other states. Influenced by the early case of Hoyt v.

Sprague, 103 U.S. 613 (1881), which refused to give a guardianship order effect beyond the state of appointment, the courts have generally held that guardianship and conservatorship orders are not entitled to full faith and credit in other states. *See, e.g.*, Morrissey v. Rogers, 21 P.2d 359 (1993), and Mack v. Mack, 618 A.2d 744 (Md. 1993). However, there have been cases where the order has been given full faith and credit in other states. *See* In re Guardianship of Enos, 670 N.E.2d 967 (Mass Ct. App. 1966); In re Prye, 169 S.W. 3d 116 (Mo. Ct. App. 2005). The widespread enactment of the UAGPPJA, which has been enacted in all but four states as of June, 2018, eliminates the doubts. The UAGPPJA recognizes that many problems could be avoided if guardianships and conservatorships established in one state were entitled to recognition in other states. Registration of guardianship and conservatorship orders is a key concept under UAGPPJA.

Subsections (c) and (d) parallel Section 434 of the 1997 act as revised in 2010 to incorporate Section 403 of the UAGPPJA. These provisions state that following registration of the order in the appropriate county of the other state, and after giving notice to the appointing court of the intent to register the order in the other state, a guardian or conservator, without the need for a new court proceeding, may exercise all powers authorized in the order of appointment except as prohibited under the laws of the registering state.

SECTION 127. GRIEVANCE AGAINST GUARDIAN OR CONSERVATOR.

(a) An individual who is subject to guardianship or conservatorship, or person interested in the welfare of an individual subject to guardianship or conservatorship, that reasonably believes the guardian or conservator is breaching the guardian's or conservator's fiduciary duty or otherwise acting in a manner inconsistent with this [act] may file a grievance in a record with the court.

(b) Subject to subsection (c), after receiving a grievance under subsection (a), the court:

(1) shall review the grievance and, if necessary to determine the appropriate response, court records related to the guardianship or conservatorship;

(2) shall schedule a hearing if the individual subject to guardianship or conservatorship is an adult and the grievance supports a reasonable belief that:

(A) removal of the guardian and appointment of a successor may be appropriate under Section 318;

(B) termination or modification of the guardianship may be appropriate

under Section 319;

(C) removal of the conservator and appointment of a successor may be appropriate under Section 430; or

(D) termination or modification of the conservatorship may be appropriate under Section 431; and

(3) may take any action supported by the evidence, including:

(A) ordering the guardian or conservator to provide the court a report, accounting, inventory, updated plan, or other information;

(B) appointing a guardian ad litem;

(C) appointing an attorney for the individual subject to guardianship or conservatorship; or

(D) holding a hearing.

(c) The court may decline to act under subsection (b) if a similar grievance was filed within the six months preceding the filing of the current grievance and the court followed the procedures of subsection (b) in considering the earlier grievance.

Comment

This section, which is new to the act, creates an accessible mechanism for bringing concerns about improper conduct by guardians or conservators to the attention of the court. The section has precedent in complaint processes enabled by statutes or court rules in a number of jurisdictions, including Idaho, Ohio, Washington, and Wyoming. It is also consistent with National Probate Court Standard 3.3.18 (2013), which calls on probate courts to "establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships and the performance of guardians/conservators."

The use of the term "grievance" instead of "complaint" or "petition" reflects the fact that the person filing the grievance need not request or seek any particular relief; the person needs only to present the court with information. Upon receipt of a grievance under this section, the court is required to consider the grievance unless both of the following are true: (1) a similar grievance has been filed in the past six months, and (2) the court followed the procedures under this section in considering the earlier grievance. The provision thus precludes the court from declining to

consider information about potential improper conduct simply because it is not formalized as a motion or petition.

Upon receipt of a grievance, under subsection (b) the court is not required to do anything more than simply consider the grievance unless the grievance supports a reasonable belief that termination of a guardianship or conservatorship, or removal of a guardian or conservator, is appropriate. In that case, the grievance serves as a "communication" within the meaning of Section 318, Section 319, Section 430, or Section 431 that triggers the processes outlined in those sections. It could likewise trigger the court to appoint a temporary substitute guardian under Section 125. Thus, upon receipt of a grievance the court itself determines whether further action is proper.

In drafting this section, the drafting committee sought to strike a balance between facilitating access to the court by non-attorneys, including individuals subject to guardianship or conservatorship, and minimizing the burden on the court's resources. By allowing a person to get the attention of the court without a formal petition or motion, the provision increases access. By requiring the grievance be in a record, as recommended by National Probate Standard 3.3.18 (2013), and allowing the court to decline consideration of a grievance if a similar grievance was made in the prior six months, the provision discourages frivolous complaints and inefficient uses of the court's time. In addition, the grievance mechanism has the potential to reduce the administrative burden on courts by allowing courts to promptly address issues that would otherwise fester unattended and create larger problems.

The inclusion of this provision reflects a recognition that improper and abusive conduct by guardians and conservators, while not the norm, is a significant and ongoing problem. Although there is no reliable estimate of the extent of such behavior, reports of abuse are not uncommon. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-33, ELDER ABUSE: THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS, 6–11 (2016) (describing the state of knowledge); U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT AND ABUSE OF SENIORS (2010) (concluding that the GAO could not determine whether guardianship abuse is widespread, but identifying hundreds of allegations during a 20-year period).

In some situations, a court might reasonably respond to a grievance filed under this section by encouraging the individual filing the grievance to engage in voluntary mediation with the guardian or conservator. For example, this might include mediation of disputes between a family member who wishes to visit with an individual subject to guardianship and the guardian who wishes to limit that visitation. Voluntary mediation would generally not be appropriate where the individual filing the grievance is the individual subject to guardianship or conservatorship as the power differential would be too great, and the voluntariness may be suspect.

[SECTION 128. DELEGATION BY PARENT. A parent of a minor, by a power of attorney, may delegate to another person for a period not exceeding [nine months] any of the

parent's powers regarding care, custody, or property of the minor, other than power to consent to marriage or adoption.]

Legislative Note: *A version of Section 128 has appeared in the Uniform Probate Code since 1969 and has been enacted in some form by more than 40 states. However, the subject matter of this section is more appropriately included in a state's general family law statutes. An enacting state should review its existing law to determine whether to include this section, and where it could be codified most appropriately.*

Comment

This section provides for a temporary delegation of powers by the parent. When a parent requires assistance for a finite period of time, such temporary delegations may serve to avoid imposition of guardianship and thus allow parents to retain the right to make decisions for their children. For example, a single parent in the military called to a tour of duty could use this provision to grant a power of attorney to allow a friend or relative to make decisions while the parent is away. Should the tour of duty exceed the statutory maximum period for such authorizations, the parent would need to renew the power. Thus, Section 128 can be seen as creating a less restrictive alternative to guardianship.

Unlike Section 105 of the 1997 act, this section only applies to parents of minors. It does not allow a parent to delegate powers over an adult nor does it allow for delegation by a guardian. The first change reflects a recognition that all adults, even those with very significant disabilities, have the right to make decisions for themselves to the extent able and that the right to do so should only be removed after full consideration and due process. The second change reflects a recognition that guardians have some non-delegable duties as set forth in Section 124. A guardian may employ agents to assist with the performance of the guardian's duties, but the guardian retains a fiduciary duty that requires the guardian, at a minimum, to use care in selecting and monitoring the agent.

This section does not create a guardianship nor does it allow a parent to grant powers the parent does not possess. Thus, the ability to make a delegation under this section may be quite limited for a parent who does not have all parental rights (e.g., a parent who does not have custody over the child).

Although this section refers to a delegation of power over property, the application of this section to property management is limited as parents' powers over the property of a minor are themselves limited. When it is necessary to secure powers over a minor's property, a petition for conservatorship will likely be appropriate.

The Uniform Deployed Parents Custody and Visitation Act (UDPCVA) may provide alternative provisions for delegation in certain situations. The UDPCVA allows the court, at the request of a deploying parent, to temporarily grant the service member's portion of custodial responsibility to an adult nonparent who is either a family member or with whom the child has a close and substantial relationship when it serves the child's best interest. In the event that a deploying

parent is the only parent with custodial responsibility of the child, the UDPCVA allows custody arrangements during the service member's deployment to be made unilaterally by power of attorney.

[ARTICLE] 2

GUARDIANSHIP OF MINOR

SECTION 201. BASIS FOR APPOINTMENT OF GUARDIAN FOR MINOR.

(a) A person becomes a guardian for a minor only on appointment by the court.

(b) The court may appoint a guardian for a minor who does not have a guardian if the court finds the appointment is in the minor's best interest and:

(1) each parent of the minor, after being fully informed of the nature and consequences of guardianship, consents;

(2) all parental rights have been terminated; or

(3) there is clear-and-convincing evidence that no parent of the minor is willing or able to exercise the powers the court is granting the guardian.

Comment

A guardian for a minor may be appointed only by a court. This is a change from the 1997 act, which allowed appointment by a parent of the minor. *See* Section 202 of the 1997 act. This change is designed to better protect the rights and welfare of the minor, as well as to better respect the rights of non-appointing parents. The parent's preferences still, however, play a substantial role in the appointment process. Under Section 206(b), the court must appoint a person nominated by the parent in a will or other record unless the court finds that the appointment would be contrary to the best interest of the minor.

Unless all parental rights have been terminated, the court may only appoint a guardian for a minor under this act if each parent of the minor provides informed consent or the court finds by clear-and-convincing evidence that no parent of the minor is able or willing to exercise the powers to be granted to the guardian. The drafters of this act could not anticipate all of the conflicts that can arise in some states between the jurisdiction of the probate court to appoint a guardian for a minor and the jurisdiction of other courts within the state to award custody or adjudicate juvenile dependency for the same child. For a discussion of the standards for the appointment of a guardian of a minor and the jurisdictional conflicts that can arise, at least in one state, see Deirdre M. Smith, *From Orphans to Families in Crisis: Parental Rights Matters in Maine Probate Courts*, 68 ME. L. REV. 45 (2016).

The court's ability to appoint a guardian for a minor under this part is in certain cases partially or wholly superseded by special legislation relating to custody of minors. Reference should be made to the Uniform Child Custody Jurisdiction and Enforcement Act (1997), the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. For a discussion of the jurisdictional limitations, see David M. English, *Minors' Guardianship in an Age of Multiple Marriage*, 29 INST. ON EST. PLAN. ¶¶ 500, 502 (1995). For more recent analyses of the Indian Child Welfare Act in relation to probate guardianships, see Amina McCoy, *The Battle of Wills: The Impact of the Indian Child Welfare Act on Parents Who Make Testamentary Appointments of Guardianship for Their Indian Children*, 28 J. JUV. L. 148 (2007); Richard B. Maltby, *The Indian Child Welfare Act of 1978 and the Missed Opportunity to Apply the Act in Guardianships*, 46 St. LOUIS U.L.J. 213 (2002).

This section, like the rest of Article 2, governs guardianship of an unemancipated minor. If an individual is below the age of majority, but has been emancipated, any guardianship over the individual would be governed by Article 3. The definition of "adult" (Section 102(1)) includes an emancipated minor.

SECTION 202. PETITION FOR APPOINTMENT OF GUARDIAN FOR MINOR.

(a) A person interested in the welfare of a minor, including the minor, may petition for appointment of a guardian for the minor.

(b) A petition under subsection (a) must state the petitioner's name, principal residence, current street address, if different, relationship to the minor, interest in the appointment, the name and address of any attorney representing the petitioner, and, to the extent known, the following:

(1) the minor's name, age, principal residence, current street address, if different, and, if different, address of the dwelling in which it is proposed the minor will reside if the appointment is made;

(2) the name and current street address of the minor's parents;

(3) the name and address, if known, of each person that had primary care or custody of the minor for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition;

(4) the name and address of any attorney for the minor and any attorney for each

parent of the minor;

(5) the reason guardianship is sought and would be in the best interest of the minor;

(6) the name and address of any proposed guardian and the reason the proposed guardian should be selected;

(7) if the minor has property other than personal effects, a general statement of the minor's property with an estimate of its value;

(8) whether the minor needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings;

(9) whether any parent of the minor needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings; and

(10) whether any other proceeding concerning the care or custody of the minor is pending in any court in this state or another jurisdiction.

Comment

This section, which is new to the act, brings together the 1997 provisions governing who may petition the court for appointment of a guardian for a minor with new provisions setting forth what must be included in the petition. The requirements in subsection (b) are designed to ensure that the court has the information necessary to adequately understand the needs and interests of the minor. For example, subsection (b)(3) requires the petitioner to include the name of each person who had primary custody of the minor for at least 60 days during the two years immediately before the petition was filed, or for at least 730 days (i.e., two years' worth of days) during the five years immediately before the filing. This provision recognizes that the minor may have bounced among caregivers or parental figures, and may have been cared for by persons other than their parents or persons with whom they currently reside. Those persons may be in a position to best inform the court as to the child's needs and interests, and may, in some cases, be qualified to serve as a guardian for the minor.

SECTION 203. NOTICE OF HEARING FOR APPOINTMENT OF GUARDIAN FOR MINOR.

(a) If a petition is filed under Section 202, the court shall schedule a hearing and the petitioner shall:

(1) serve notice of the date, time, and place of the hearing, together with a copy of the petition, personally on each of the following that is not the petitioner:

(A) the minor, if the minor will be 12 years of age or older at the time of the hearing;

(B) each parent of the minor or, if there is none, the adult nearest in kinship who can be found with reasonable diligence;

(C) any adult with whom the minor resides;

(D) each person that had primary care or custody of the minor for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition; and

(E) any other person the court determines should receive personal service of notice; and

(2) give notice under Section 113 of the date, time, and place of the hearing, together with a copy of the petition, to:

(A) any person nominated as guardian by the minor, if the minor is 12 years of age or older;

(B) any nominee of a parent;

(C) each grandparent and adult sibling of the minor;

(D) any guardian or conservator acting for the minor in any jurisdiction;

and

(E) any other person the court determines.

(b) Notice required by subsection (a) must include a statement of the right to request appointment of an attorney for the minor or object to appointment of a guardian and a description of the nature, purpose, and consequences of appointment of a guardian.

(c) The court may not grant a petition for guardianship of a minor if notice substantially complying with subsection (a)(1) is not served on:

(1) the minor, if the minor is 12 years of age or older; and

(2) each parent of the minor, unless the court finds by clear-and-convincing evidence that the parent cannot with due diligence be located and served or the parent waived, in a record, the right to notice.

(d) If a petitioner is unable to serve notice under subsection (a)(1) on a parent of a minor or alleges that the parent waived, in a record, the right to notice under this section, the court shall appoint a [visitor] who shall:

(1) interview the petitioner and the minor;

(2) if the petitioner alleges the parent cannot be located, ascertain whether the parent cannot be located with due diligence; and

(3) investigate any other matter relating to the petition the court directs.

Legislative Note: *The term "visitor" is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.*

Comment

This section builds on the notice provisions found in Section 205(a) of the 1997 act. It recognizes that families have grown more complex over the years and that the minor is more likely to be residing with individuals other than a parent or parents. It also recognizes that the age at which a minor may participate in the proceeding, which has long been age 14, should be

revised in light of changes in other areas of child welfare law. Under this section and under the act generally, a minor acquires significant rights at age 12.

Paragraph (a)(1) lists the persons who must receive personal notice of a petition and hearing for guardianship of a minor. Personal service must be given to: (1) the minor if the minor will be at least 12 years of age at the time of the hearing on the petition; (2) each parent of the minor (unless there is none, in which case notice is to be provided to the adult nearest in kinship who can be located with reasonable diligence); (3) any adult with whom the minor resides; (4) any person who had primary care or custody of the minor for at least 60 days during the two years immediately before the petition was filed; or at least 730 days (i.e., two years' worth of days) during the 5 years immediately before the filing; and (5) any other person the court directs. The petitioner may give personal notice to other persons, including a younger minor who is the subject of a proceeding, but is not required to do so.

Paragraph (a)(2) lists the persons who must receive notice of the petition and hearing for guardianship of a minor, but for whom personal service is not required. Persons in this category are: (1) any person nominated to serve as guardian by a parent of the minor or by a minor who is at least 12 years old; (2) each grandparent of the minor; (3) each adult sibling of the minor; (4) any guardian or conservator already acting for the minor; and (5) any other person whom the court determines.

Subsection (c) provides that failure to give notice to a minor who is at least 12 years of age is jurisdictional. Likewise, failure to give notice to a parent of the minor is jurisdictional unless the court finds by clear-and-convincing evidence that the parent cannot be located and served even with due diligence, or that the parent waived the right to notice in a record. By contrast, the other notice requirements in this section are not jurisdictional.

Subsection (c) and subsection (d) taken together allow the court to grant a guardianship over a minor without notice to a parent of that minor if the parent waived the right to notice in a record. This is something a parent might do if the parent was fearful of being located, or anticipated that future events would make him or her difficult to locate. For example, an undocumented parent might fear deportation, or a parent with an ongoing fear of domestic violence or other targeted victimization might fear being located by an aggressor. Under subsection (d), if the petitioner is unable to serve notice on a parent or alleges the parent waived, in a record, the right to that notice, the court must appoint a visitor to investigate. The visitor, at a minimum, must interview both the petitioner and the minor, and, if the petitioner alleges that the parent cannot be located, ascertain whether it is in fact true that the parent cannot be located with due diligence.

SECTION 204. ATTORNEY FOR MINOR OR PARENT.

(a) The court shall appoint an attorney to represent a minor who is the subject of a proceeding under Section 202 if:

(1) requested by the minor and the minor is 12 years of age or older;

(2) recommended by a guardian ad litem; or

(3) the court determines the minor needs representation.

(b) An attorney appointed under subsection (a) shall:

(1) make a reasonable effort to ascertain the minor's wishes;

(2) advocate for the minor's wishes to the extent reasonably ascertainable; and

(3) if the minor's wishes are not reasonably ascertainable, advocate for the minor's best interest.

(c) A minor who is the subject of a proceeding under Section 202 may retain an attorney to represent the minor in the proceeding.

(d) A parent of a minor who is the subject of a proceeding under Section 202 may retain an attorney to represent the parent in the proceeding.

[(e) The court shall appoint an attorney to represent a parent of a minor who is the subject of a proceeding under Section 202 if:

(1) the parent objects to appointment of a guardian for the minor;

(2) the court determines that counsel is needed to ensure that consent to appointment of a guardian is informed; or

(3) the court otherwise determines the parent needs representation.]

Legislative Note: *Subsection (e) is in brackets because states have different policies regarding rights of parents in these cases.*

Comment

Section 204 covers both the right to retain an attorney and the right to have an attorney appointed by the court, as well as the role of the attorney for the minor. The 1997 treatment of these issues was limited to a provision in Section 205(c) of that act permitting the court to appoint an attorney for a minor.

As set forth in subsections (c) and (d), a minor who is the subject of a guardianship proceeding has a right to retain an attorney to represent the minor's interest, and a parent of that minor has a

right to retain an attorney to represent the parent's interest.

Subsection (a) requires the court to appoint an attorney for a minor if the minor requests an attorney and the minor is at least 12 years old, appointment is recommended by the guardian ad litem, or the court determines that the minor needs representation. The court is not required to appoint the particular attorney requested by the minor or suggested by the guardian ad litem.

Subsection (b) provides that an attorney appointed for a minor under subsection (a) is to make a reasonable effort to determine the minor's wishes with respect to the guardianship petition, and to advocate for those wishes. The attorney may advocate for the minor's best interest only if the minor's wishes are not reasonably ascertainable, or if the minor's wishes are the same as the minor's best interest. Thus, the role of the attorney for a minor is quite different than the role of a guardian ad litem. The two serve different purposes and different masters. The attorney for the minor serves as the minor's representative. As indicated in Section 115, by contrast, the guardian ad litem serves as an extension of the court.

Subsection (e), which is in brackets, requires a court in certain situations to appoint an attorney to represent a parent of a minor who is the subject of a guardianship proceeding. Specifically, appointment is required if (1) the parent objects to appointment of a guardian, (2) the parent is purporting to consent to the guardianship or is considering consenting to the guardianship and the court determines an appointment is needed to make sure that the consent is informed, or (3) the court determines that the parent needs representation for some other reason. Including subsection (e) in the act provides greater protection for the rights of parents, and may also help parents protect the interests of their minor children. The subsection is in brackets, however, in recognition that the provisions in subsection (e) have a fiscal cost and that states have different policies with regards to parents' rights to representation. In determining whether to enact subsection (e) states will likely wish to weigh the benefit of representation to protect parents' fundamental rights and interests in parenting their children against fiscal constraints.

SECTION 205. ATTENDANCE AND PARTICIPATION AT HEARING FOR APPOINTMENT OF GUARDIAN FOR MINOR.

(a) The court shall require a minor who is the subject of a hearing under Section 203 to attend the hearing and allow the minor to participate in the hearing unless the court determines, by clear-and-convincing evidence presented at the hearing or a separate hearing, that:

(1) the minor consistently and repeatedly refused to attend the hearing after being fully informed of the right to attend and, if the minor is 12 years of age or older, the potential consequences of failing to do so;

(2) there is no practicable way for the minor to attend the hearing;

(3) the minor lacks the ability or maturity to participate meaningfully in the hearing; or

(4) attendance would be harmful to the minor.

(b) Unless excused by the court for good cause, the person proposed to be appointed as guardian for a minor shall attend a hearing under Section 203.

(c) Each parent of a minor who is the subject of a hearing under Section 203 has the right to attend the hearing.

(d) A person may request permission to participate in a hearing under Section 203. The court may grant the request, with or without hearing, on determining that it is in the best interest of the minor who is the subject of the hearing. The court may impose appropriate conditions on the person's participation.

Comment

Section 205 is new to the act as the 1997 act did not address the minor's participation in the hearing.

Subsection (a) requires the minor alleged to need a guardian to be present at the hearing on the guardianship petition with an opportunity to participate in that hearing unless the court finds by clear-and-convincing evidence that one of the four exceptions listed in subsection (a) exists.

The first exception is that the minor consistently and repeatedly refused to attend after being informed of the right to attend. If 12 years of age or older, the minor must also have been informed of the potential consequences of non-attendance. This requirement recognizes that merely telling a minor he or she should attend a hearing may not be sufficient to protect the minor's right to attend. To make an informed decision, the minor needs to know why it might be in the minor's interest to attend.

The second exception applies when there is no practicable way for the minor to attend the hearing. The fact that the minor may have a substantial disability that makes it impossible to access the location where hearings are traditionally held does not mean there is no practicable way for the minor to attend. Hearing locations can be moved to accommodate the minor's challenges.

The third exception applies when the minor lacks the ability or maturity to participate meaningfully in the hearing. This exception, for example, could excuse the participation of an

infant. It should be used sparingly, however, as the best way for the court to determine whether the minor has the requisite ability and maturity is to have the minor present at the hearing on the guardianship.

The fourth exception applies when attendance would be harmful to the minor. This exception should also be used sparingly. The fact that the hearing may be upsetting for the minor is not adequate justification for denying the minor the right to attend and participate. In determining whether this exception applies, the court must consider not merely the potential harms to the minor, but also the potential benefits of attendance. Benefits to the minor may include: (1) the opportunity to voice his or her preferences, (2) a more appropriate order because the court had the benefit of observing the minor and potentially hearing from the minor, (3) the minor gaining a better understanding of what is happening to him or her, and (4) the minor avoiding feelings of disempowerment.

Subsection (b) requires a person proposed as guardian to attend the hearing unless the court excuses that attendance for good cause.

Subsection (c) provides that each parent of the minor has the right to attend the hearing. Under the act, this right is absolute.

Subsection (d) allows any person to request permission to participate in a hearing for guardianship of a minor. The request should be granted if the court finds that the person's participation is in the best interest of the minor. Even if the court grants the request, the court may impose conditions on the person's participation. For example, the court could limit the person's participation to testimony on a particular issue.

SECTION 206. ORDER OF APPOINTMENT; PRIORITY OF NOMINEE; LIMITED GUARDIANSHIP FOR MINOR.

(a) After a hearing under Section 203, the court may appoint a guardian for a minor, if appointment is proper under Section 201, dismiss the proceeding, or take other appropriate action consistent with this [act] or law of this state other than this [act].

(b) In appointing a guardian under subsection (a), the following rules apply:

(1) The court shall appoint a person nominated as guardian by a parent of the minor in a will or other record unless the court finds the appointment is contrary to the best interest of the minor.

(2) If multiple parents have nominated different persons to serve as guardian, the

court shall appoint the nominee whose appointment is in the best interest of the minor, unless the court finds that appointment of none of the nominees is in the best interest of the minor.

(3) If a guardian is not appointed under paragraph (1) or (2), the court shall appoint the person nominated by the minor if the minor is 12 years of age or older unless the court finds that appointment is contrary to the best interest of the minor. In that case, the court shall appoint as guardian a person whose appointment is in the best interest of the minor.

(c) In the interest of maintaining or encouraging involvement by a minor's parent in the minor's life, developing self-reliance of the minor, or for other good cause, the court, at the time of appointment of a guardian for the minor or later, on its own or on motion of the minor or other interested person, may create a limited guardianship by limiting the powers otherwise granted by this [article] to the guardian. Following the same procedure, the court may grant additional powers or withdraw powers previously granted.

(d) The court, as part of an order appointing a guardian for a minor, shall state rights retained by any parent of the minor, which may include contact or visitation with the minor, decision making regarding the minor's health care, education, or other matter, or access to a record regarding the minor.

(e) An order granting a guardianship for a minor must state that each parent of the minor is entitled to notice that:

(1) the guardian has delegated custody of the minor subject to guardianship;

(2) the court has modified or limited the powers of the guardian; or

(3) the court has removed the guardian.

(f) An order granting a guardianship for a minor must identify any person in addition to a parent of the minor which is entitled to notice of the events listed in subsection (e).

Comment

Subsection (a) sets forth the possible dispositions for a hearing under Section 203. In addition to appointing a guardian or dismissing the proceeding, the court may take other appropriate action consistent with the law. This could include, for example, a transfer to another court such as a juvenile or family court that may be better positioned to address the specific situation.

Subsection (b) creates a limited list of people with priority for appointment. Absent a nomination by a parent of the minor, the only person having preference for appointment as guardian under this section is the person nominated by a minor age 12 or older. Regardless of the preference granted, the court may not appoint a person whose appointment the court finds would be contrary to the best interest of the minor.

Subsection (c) applies the concept of limited guardianship to minors. A court, whenever possible, should only grant to the guardian those powers actually needed. A limited guardianship may be appropriate, for example, in situations where the minor's parents are only unable or unwilling to exercise some rights. For example, a parent may have an intellectual disability that significantly limits the parent's ability to make certain types of informed decisions for the minor but does not prevent the parent from making other decisions for the minor, potentially with support. The court should be specific about identifying the powers of the guardian regarding the minor's education, care, health, safety, and welfare. This section gives the court flexibility to design the guardianship in a way to preserve parental authority to make certain decisions regarding the minor or to empower the minor as much as possible to make the minor's own decisions (either at the time of appointment or at a later date when the minor is more mature) when appropriate. Subsection (c) can be used by the court to either expand or limit the guardian's powers. Although the court can grant additional powers, the court cannot grant powers beyond those provided in Section 210.

Subsection (d) requires the court to specify in the order which parental rights, if any, are to be retained by the parent as part of a limited guardianship. Representative rights listed in subsection (d) include contact or visitation with the minor, decision making regarding the minor's health care, education, or other matter, or access to a record concerning the minor. This listing is not exclusive.

Subsection (e) requires orders granting guardianship of a minor give parents of the minor the right to notice of certain major changes: (1) the guardian delegates custody of the minor, (2) the court modifies or limits the guardian's powers, or (3) the court removes the guardian. This provision is designed to protect the fundamental rights of parents, and to provide some additional degree of monitoring. As set forth in subsection (f), the court may choose to grant the same right to notice to a person other than a parent who has an interest in the minor's welfare.

SECTION 207. STANDBY GUARDIAN FOR MINOR.

(a) A standby guardian appointed under this section may act as guardian, with all duties and powers of a guardian under Sections 209 and 210, when no parent of the minor is willing or

able to exercise the duties and powers granted to the guardian.

(b) A parent of a minor, in a signed record, may nominate a person to be appointed by the court as standby guardian for the minor. The parent, in a signed record, may state desired limitations on the powers to be granted the standby guardian. The parent, in a signed record, may revoke or amend the nomination at any time before the court appoints a standby guardian.

(c) The court may appoint a standby guardian for a minor on:

(1) petition by a parent of the minor or a person nominated under subsection (b); and

(2) finding that no parent of the minor likely will be able or willing to care for or make decisions with respect to the minor not later than [two years] after the appointment.

(d) A petition under subsection (c)(1) must include the same information required under Section 202 for the appointment of a guardian for a minor.

(e) On filing a petition under subsection (c)(1), the petitioner shall:

(1) serve a copy of the petition personally on:

(A) the minor, if the minor is 12 years of age or older, and the minor's attorney, if any;

(B) each parent of the minor;

(C) the person nominated as standby guardian; and

(D) any other person the court determines; and

(2) include with the copy of the petition served under paragraph (1) a statement of the right to request appointment of an attorney for the minor or to object to appointment of the standby guardian, and a description of the nature, purpose, and consequences of appointment of a standby guardian.

(f) A person entitled to notice under subsection (e), not later than 60 days after service of the petition and statement, may object to appointment of the standby guardian by filing an objection with the court and giving notice of the objection to each other person entitled to notice under subsection (e).

(g) If an objection is filed under subsection (f), the court shall hold a hearing to determine whether a standby guardian should be appointed and, if so, the person that should be appointed. If no objection is filed, the court may make the appointment.

(h) The court may not grant a petition for a standby guardian of the minor if notice substantially complying with subsection (e) is not served on:

(1) the minor, if the minor is 12 years of age or older; and

(2) each parent of the minor, unless the court finds by clear-and-convincing evidence that the parent, in a record, waived the right to notice or cannot be located and served with due diligence.

(i) If a petitioner is unable to serve notice under subsection (e) on a parent of the minor or alleges that a parent of the minor waived the right to notice under this section, the court shall appoint a [visitor] who shall:

(1) interview the petitioner and the minor;

(2) if the petitioner alleges the parent cannot be located and served, ascertain whether the parent cannot be located with due diligence; and

(3) investigate any other matter relating to the petition the court directs.

(j) If the court finds under subsection (c) that a standby guardian should be appointed, the following rules apply:

(1) The court shall appoint the person nominated under subsection (b) unless the

court finds the appointment is contrary to the best interest of the minor.

(2) If the parents have nominated different persons to serve as standby guardian, the court shall appoint the nominee whose appointment is in the best interest of the minor, unless the court finds that appointment of none of the nominees is in the best interest of the minor.

(k) An order appointing a standby guardian under this section must state that each parent of the minor is entitled to notice, and identify any other person entitled to notice, if:

(1) the standby guardian assumes the duties and powers of the guardian;

(2) the guardian delegates custody of the minor;

(3) the court modifies or limits the powers of the guardian; or

(4) the court removes the guardian.

(*l*) Before assuming the duties and powers of a guardian, a standby guardian must file with the court an acceptance of appointment as guardian and give notice of the acceptance to:

(1) each parent of the minor, unless the parent, in a record, waived the right to notice or cannot be located and served with due diligence;

(2) the minor, if the minor is 12 years of age or older; and

(3) any person, other than the parent, having care or custody of the minor.

(m) A person that receives notice under subsection (*l*) or any other person interested in the welfare of the minor may file with the court an objection to the standby guardian's assumption of duties and powers of a guardian. The court shall hold a hearing if the objection supports a reasonable belief that the conditions for assumption of duties and powers have not been satisfied.

Comment

Section 207 creates an option for a court to appoint a standby guardian for a minor. This section is substantially different and hopefully much improved from the standby guardianship provisions

under the 1997 act, which were located in Sections 202 and 203. The standby guardian, as stated in subsection (a), becomes empowered to act as guardian when no parent of the minor is able and willing to exercise the duties granted to the guardian. This provision is most likely to be used by parents who anticipate losing the ability to care for their children. This includes parents facing a terminal illness, incarceration, or deportation. While there are similarities in the process for appointing a guardian to act immediately and for appointing a standby guardian, a key difference is that—unless someone entitled to object does so—a court may appoint a standby guardian without holding a hearing.

As set forth in subsections (b) and (c), for the court to appoint a standby guardian, a parent of the minor must nominate someone to serve as standby guardian, and either the nominee or a parent of the minor must petition the court to appoint the nominee. Before appointing a standby guardian, the court must find it is likely that no parent of the minor will be able or willing to care for or make decisions for the minor within two years of the appointment (or, if the state selects a different period, within the applicable period). The limited timeframe is designed to ensure the appointment is close enough in time to when the standby guardian would likely serve that the court has sufficient information to make an appointment that likely will be appropriate at the time needed. If the timeframe were too long—say five or ten years—there would be a much greater risk of circumstances changing in a material way between the time of appointment and acceptance of that appointment by the standby guardian.

Subsection (e) requires notice of the petition and hearing to be served personally on each parent of the minor, the person nominated as standby guardian, the minor if the minor is at least 12 years old, and any other person the court determines. To ensure that those receiving notice understand what is being sought and the key rights at stake, subsection (e)(2) requires the notice to explain the role of a standby guardian and the consequences of an appointment, the right to object, and the right to a request that an attorney be appointed for the minor.

As set forth in subsection (h), notice to a minor 12 years of age or older is jurisdictional. Notice to a parent of the minor is also jurisdictional. Failure to provide personal notice to each parent of the minor precludes the court from appointing the standby guardian unless the court finds by clear-and-convincing evidence that (1) the parent waived, in a record, the right to notice or (2) cannot be located and served with due diligence. If a petitioner is unable to serve notice on a parent or alleges that the parent waived the right to notice, subsection (i) requires the court to appoint a visitor to investigate. The visitor, at a minimum, must interview both the petitioner and the minor, and, if the petitioner alleges that the parent cannot be located, ascertain whether it is in fact true that the parent cannot be located with due diligence.

Subsections (f) and (g) provide for objection to an appointment and require a court hearing if an objection is received. Specifically, any person entitled to notice under subsection (e) has a right to object to the appointment of the nominee. If an objection is filed in a timely manner, the court must then hold a hearing to determine whether a standby guardian should be appointed for the minor and, if so, who should be appointed as standby guardian. If no timely objection is made, the court may make the appointment without any hearing. The court may, of course, choose to hold a hearing even if no objection is filed.

Subsection (j) contains provisions governing priority for appointment. It creates a limited list for priority. The court must appoint the person nominated unless the court finds doing so to be contrary to the best interest of the minor. Subsection (j) also recognizes that different parents may have nominated different people to serve as standby guardian. In choosing between the nominees, the best interest of the minor governs.

Subsection (k) requires that an order appointing a standby guardian state that each parent must be notified if and when the standby guardian assumes the duties and powers of the guardian. In addition, the order must state that each parent is entitled to notice that the guardian has delegated custody of the minor, the court has modified or limited the guardian's powers, or the court has removed the guardian. This provision is designed to protect the fundamental rights of parents, and to provide some additional degree of monitoring. Similar to Section 206(f) on the appointment of a regular guardian, the court may grant the same right of notice to a person other than a parent.

Subsection (*l*) requires a standby guardian to file notice of acceptance of the appointment and give notice of that acceptance before assuming the duties and powers of a guardian. Under subsection (m), persons who are entitled to notice under subsection (*l*), or any other person interested in the welfare of the minor, may file an objection to that assumption of duties. The court then must hold a hearing if the objection supports a reasonable belief that the guardian is attempting to assume duties when assumption is not appropriate. For example, a parent might object on the grounds that the parent is still able and willing to exercise their parental duties.

Subsections (f) and (g) require that the court hold a hearing on an objection to the initial appointment of a standby guardian if the objection is filed not later than 60 days after service of the petition and statement. Subsection (m) grants an additional right to object upon the standby guardian's assumption of duties and powers of a guardian. The court must hold a hearing on an objection filed under subsection (m) if the objection supports a reasonable belief that the conditions for assumption of duties and powers have not been satisfied.

SECTION 208. EMERGENCY GUARDIAN FOR MINOR.

(a) On its own, or on petition by a person interested in a minor's welfare, the court may appoint an emergency guardian for the minor if the court finds:

(1) appointment of an emergency guardian is likely to prevent substantial harm to the minor's health, safety, or welfare; and

(2) no other person appears to have authority and willingness to act in the circumstances.

(b) The duration of authority of an emergency guardian for a minor may not exceed [60]

days and the emergency guardian may exercise only the powers specified in the order of appointment. The emergency guardian's authority may be extended once for not more than [60] days if the court finds that the conditions for appointment of an emergency guardian in subsection (a) continue.

(c) Except as otherwise provided in subsection (d), reasonable notice of the date, time, and place of a hearing on a petition for appointment of an emergency guardian for a minor must be given to:

(1) the minor, if the minor is 12 years of age or older;

(2) any attorney appointed under Section 204;

(3) each parent of the minor;

(4) any person, other than a parent, having care or custody of the minor; and

(5) any other person the court determines.

(d) The court may appoint an emergency guardian for a minor without notice under subsection (c) and a hearing only if the court finds from an affidavit or testimony that the minor's health, safety, or welfare will be substantially harmed before a hearing with notice on the appointment can be held. If the court appoints an emergency guardian without notice to an unrepresented minor or the attorney for a represented minor, notice of the appointment must be given not later than 48 hours after the appointment to the individuals listed in subsection (c). Not later than [five] days after the appointment, the court shall hold a hearing on the appropriateness of the appointment.

(e) Appointment of an emergency guardian under this section, with or without notice, is not a determination that a basis exists for appointment of a guardian under Section 201.

(f) The court may remove an emergency guardian appointed under this section at any

time. The emergency guardian shall make any report the court requires.

Comment

Section 208 governs emergency guardians for minors. An emergency guardian is a person appointed for a limited period to address an urgent concern. The emergency guardianship allows a court to make a time-limited appointment without the full process otherwise required to appoint a guardian. Specifically, the court may appoint an emergency guardian only if the appointment is needed to prevent substantial harm to the minor's health, safety, or welfare and there is no one with authority who is willing to act in the circumstances. Thus, appointment is not permitted where the evidence indicates the minor's needs can be adequately met without an appointment. Likewise, appointment is not permitted to address trifling or non-consequential harms.

Any person interested in the welfare of a minor may petition for appointment of an emergency guardian. The court may also appoint one on its own motion, without a petition, if a basis for appointment exists under subsection (a). An emergency guardianship is intended to address urgent situations. It can be an appropriate intervention when a minor is having a health care crisis or other urgent situation requiring decisions but one or both parents are temporarily absent, refusing to act, or unable to act.

Prior notice is required before appointment of an emergency guardian unless the court finds from affidavit or testimony that the minor will be seriously harmed during the time needed to give notice. Only then may the court act without notice. Subsection (c) provides that unless an exception applies, notice of the hearing on a petition for an emergency guardian must be given to the minor if the minor is at least 12 years of age, to each parent of the minor, to any attorney appointed by the court for the minor or the minor's parent, to any person other than a parent having care or custody of the minor, and to any other person the court directs. Subsection (c) does not require personal service, but simply reasonable notice. State law and state practice on expedited matters, particularly expedited matters involving minors, should be consulted to determine what constitutes reasonable notice in this context.

Proceedings without prior notice should be the *rare exception* rather than the rule. A court should have a process established to provide notice on an emergency basis. However, Section 208 recognizes that occasionally there will be situations where giving prior notice on an emergency guardianship petition is simply not feasible. Subsection (d), therefore, allows an appointment of an emergency guardian for a minor without notice if the court makes certain findings based on affidavit or testimony. Specifically, the court must find that the minor's health, safety, or welfare will be substantially harmed before a hearing with notice could be held. Furthermore, when an emergency guardianship is established without prior notice, notice must be given within 48 hours of the appointment and a return hearing held within five days of the appointment. Although the five days is bracketed, giving states the option of adopting a different time limit, five days is the minimum notice requirement in most states for an *ex parte* hearing. If the enacting states chooses to enact a time limit other than five days, to adequately protect the minor the time chosen should be relatively short.

As set forth in subsection (b), the court must limit the duration of the emergency guardian's authority to a set period of time, which may be extended only once. The 60-day limit suggested in brackets is designed to strike a balance between creating a long enough appointment that the court can reasonably go through a full guardianship process during that period if necessary, and a short enough period that fundamental due process rights are not denied.

Subsection (e) states that an emergency guardian appointment does not mean the court made the findings necessary to appoint a guardian for a period longer than the maximum duration of an emergency appointment. Thus, the existence of an emergency guardianship should not be treated as evidence the requirements set forth in Section 201 have been satisfied.

Finally, Subsection (f) allows the court to remove an emergency guardian at any time, and to require the guardian to report to the court.

The procedures under this subsection are similar to the procedures for emergency appointments for adults, found in Section 312. This section builds upon Section 204(e) of the 1997 act. Key modifications from the 1997 version include a longer duration for an emergency appointment, the ability to extend the appointment once, and a clear statement that appointment of an emergency guardian is not a determination that a basis for appointment of a guardian exists under Section 201.

SECTION 209. DUTIES OF GUARDIAN FOR MINOR.

(a) A guardian for a minor is a fiduciary. Except as otherwise limited by the court, a guardian for a minor has the duties and responsibilities of a parent regarding the minor's support, care, education, health, safety, and welfare. A guardian shall act in the minor's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian for a minor shall:

(1) be personally acquainted with the minor and maintain sufficient contact with the minor to know the minor's abilities, limitations, needs, opportunities, and physical and mental health;

(2) take reasonable care of the minor's personal effects and bring a proceeding for a conservatorship or protective arrangement instead of conservatorship if necessary to protect other property of the minor;

(3) expend funds of the minor which have been received by the guardian for the

minor's current needs for support, care, education, health, safety, and welfare;

(4) conserve any funds of the minor not expended under paragraph (3) for the minor's future needs, but if a conservator is appointed for the minor, pay the funds at least quarterly to the conservator to be conserved for the minor's future needs;

(5) report the condition of the minor and account for funds and other property of the minor in the guardian's possession or subject to the guardian's control, as required by court rule or ordered by the court on application of a person interested in the minor's welfare;

(6) inform the court of any change in the minor's dwelling or address; and

(7) in determining what is in the minor's best interest, take into account the minor's preferences to the extent actually known or reasonably ascertainable by the guardian.

Comment

Typically, a guardian of a minor functions as a substitute parent, but without the parents' personal financial responsibility for the minor's support. As provided in subsection (a), the duties of a parent to which the guardian succeeds are those relating to the minor's support, care, education, health, safety, and welfare. A guardian is also a fiduciary with fiduciary responsibilities. A guardian must always act in the minor's best interest and exercise reasonable care, diligence, and prudence. Subsection (b) of this section, and Section 210 are, in substantial part, expansions on the underlying responsibilities set forth in subsection (a).

A guardian is more than a caretaker. The guardian must, as required by subsection (b)(1), become or remain personally acquainted with the minor and maintain sufficient contact to know of the capacities, limitations, needs, opportunities, and physical and mental health of the minor. Such contact is also essential if the guardian is to act in the best interest of the minor. To determine what is in the minor's best interest, the guardian should engage with the minor to learn the minor's preferences. As provided in subsection (b)(7), the guardian must take these expressed preferences into account to the extent actually known or reasonably ascertainable. Engagement with the minor is also essential to involve the minor in decision making. Such involvement is important to develop the minor's own decision-making skills to prepare the minor for future independence.

A guardian's powers with respect to the property of the minor are very limited. If the minor has significant property requiring management, the guardian should petition the court for the appointment of a conservator or other protective order as provided in subsection (b)(2). However, subsection (b)(3) requires that the guardian use the minor's funds, including government benefits received for the minor, for the minor's support, care, education, health,

safety and welfare. The guardian must conserve any funds not expended for the minor's future needs, and periodically turn over the excess to the conservator, if one has been appointed. *See* subsection (b)(4). A guardian may also be required to report the minor's condition to the court as well as to account for money and other assets in the guardian's possession or subject to the guardian's control. *See* subsection (b)(5). Regardless of whether the court has specifically ordered it, a guardian must also always inform the court of any change in the minor's dwelling or address. *See* subsection (b)(6). Temporary absences, such as for vacations, need not be reported. This required reporting to the court is consistent with the recommendation in National Probate Court Standards, Standard 3.3.16 "Reports by the Guardian" (2013). Keeping the court informed of the minor's location helps the court to exercise appropriate oversight of the guardianship. If the minor is removed to another state, it will also prevent the court from losing jurisdiction over the case without the court's knowledge. *See* also Section 210(b)(2), which requires the permission of the court before the minor may be relocated to another state.

This section is based on Section 207 of the 1997 act. A key change from that version is the explicit instruction that the guardian must take into account the minor's known or reasonably ascertainable preferences. This requirement was only arguably implied by the 1997 act.

SECTION 210. POWERS OF GUARDIAN FOR MINOR.

(a) Except as otherwise limited by court order, a guardian of a minor has the powers a parent otherwise would have regarding the minor's support, care, education, health, safety, and welfare.

(b) Except as otherwise limited by court order, a guardian for a minor may:

(1) apply for and receive funds and benefits otherwise payable for the support of the minor to the minor's parent, guardian, or custodian under a statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(2) unless inconsistent with a court order entitled to recognition in this state, take custody of the minor and establish the minor's place of dwelling and, on authorization of the court, establish or move the minor's dwelling outside this state;

(3) if the minor is not subject to conservatorship, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the minor or make a payment for the benefit of the minor;

(4) consent to health or other care, treatment, or service for the minor; or

(5) to the extent reasonable, delegate to the minor responsibility for a decision affecting the minor's well-being.

(c) The court may authorize a guardian for a minor to consent to the adoption of the minor if the minor does not have a parent.

(d) A guardian for a minor may consent to the marriage of the minor [if authorized by the court].

Legislative Note: *An enacting state should consider its existing law governing consent to marriage by minors when determining whether to require specific authorization of consent to marriage.*

Comment

This section should be read with Section 209. Section 209 sets out the duties of the guardian for a minor: those responsibilities which a guardian may not ignore. Section 210 sets out the guardian's powers, the grant of which are necessary in order for the guardian to carry out the duties specified in Section 209.

Section 209(a) imposes on the guardian certain of the duties of a parent. To enable the guardian to properly carry out those duties, subsection (a) of this section grants the guardian corresponding powers of a parent with regard to the support, care, education, health, safety, and welfare of the minor. Subsection (b) of this section then lays out specific applications of the general powers granted in subsection (a).

Subsections (b)(1) and (3) enable the guardian to carry out the guardian's limited duties with respect to the management of the property of the minor. The powers of the guardian over the minor's property are quite limited, recognizing that a conservator should be appointed or other protective order sought for the minor if the minor owns a significant amount of property. The guardian is authorized under subsection (b)(1) to apply for government benefits to which the minor is entitled. Under Section 209(b)(3), the guardian must use those benefits for the minor's support, care, education, health, safety, and welfare. Upon appointment, a guardian should also investigate whether proper application has been made for all governmental benefits to which the minor may be entitled. It may also be necessary for the guardian to seek appointment as a representative payee, should the governmental agency in question use a representative payee mechanism for making payments on behalf of beneficiaries without legal capacity.

Subsection (b)(2) recognizes that other courts may have a role in determining the custody of the minor. While a guardian generally has a right to take custody of the minor, the guardian is denied this power if to assume custody would be inconsistent with the custody order of a court of

competent jurisdiction. Such an order may have been entered by a juvenile court, by a court responsible for making involuntary mental health commitments, or even by the court supervising the guardianship.

Subsection (b)(2) also prevents the guardian from moving the minor out of state without the court's prior approval. The court must determine whether such a move would be in the best interest of the minor. The court should make certain that this provision is not used to circumvent a custody order or to avoid a determination of custody by an appropriate court. The court should also be aware that the move to another state with the court's approval will eventually result in the loss of the court's jurisdiction pursuant to the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and the Uniform Child Custody Jurisdiction and Enforcement Act.

If there is no conservator, subsection (b)(3) authorizes the guardian to file a proceeding to collect child support. In implementing this power, the guardian should consult the state's applicable child support statutes, which should be read as if incorporated into this section.

Under subsection (b)(4), the guardian may consent to health care or other care, treatment, or service for the minor. The guardian may ordinarily make health-care decisions for the minor without prior court authorization, but for certain types of health-care decisions, prior court approval may be required or at least be considered. For example, a guardian may ordinarily consent to elective surgery for the minor, but the guardian is strongly advised to consider seeking prior court authorization before consenting to experimental medical treatment. While this act does not specifically require that a guardian seek prior court approval before making a particular health-care decision, such prior court approval may be required by other statute, especially when the minor's constitutional rights are in question. For example, a guardian may not be able to place a minor in a mental health care facility or consent to electroconvulsive therapy (ECT) or other types of shock therapy without the court's order. State statutes may require that specific procedures be followed before a guardian can consent to an abortion or certain medical treatment for the minor. Because of the important and competing interests at stake, a guardian should at least consult with, and may need to obtain an order from, the court if the guardian plans to refuse medical treatment on behalf of the minor on the grounds of the minor's religious beliefs.

Consistent with the act's focus on recognizing the personhood and abilities of those subject to guardianship, subsection (b)(5) permits the guardian, if reasonable under all of the circumstances, to delegate to the minor certain responsibilities for decisions affecting the minor's well-being. Such delegation may help the minor to develop a sense of self and decision-making skills. Notably, unlike the 1997 act, this act does not use the term "self-reliance." This change reflects a modern understanding that one can be independent and in control of one's own life and still receive support and assistance from others.

Under subsection (c), the court may specifically authorize the guardian to consent to the minor's adoption. This provision was carried forward from Section 208(c) of the 1997 act, which was in turn carried forward from Section 2-109(c)(5) of the 1982 act. This court is chosen because under Section 211 of this act the adoption of the minor will have the effect of terminating the guardianship. An enacting jurisdiction should verify that subsection (c) is in harmony with the state's existing adoption laws.

To the extent that the guardian's consent may be necessary for the minor to marry, subsection (d) does allow a guardian to consent to the marriage of the minor. Whether such consent is relevant or required will depend on the state's laws on the requirements of marriage. This provision was included in order to create a workable provision for states that still recognize child marriage despite a strong movement to curtail this practice. Recognizing that state law on this issue varies, the language requiring that the guardian's consent to marriage be authorized by the court has been placed in brackets.

This section is based on Section 208 of the 1997 act. However, the 1997 act did not address the issue of whether a guardian could consent to the minor's marriage.

SECTION 211. REMOVAL OF GUARDIAN FOR MINOR; TERMINATION OF GUARDIANSHIP; APPOINTMENT OF SUCCESSOR.

(a) Guardianship under this [act] for a minor terminates:

(1) on the minor's death, adoption, emancipation, or attainment of majority; or

(2) when the court finds that the standard in Section 201 for appointment of a guardian is not satisfied, unless the court finds that:

(A) termination of the guardianship would be harmful to the minor; and

(B) the minor's interest in the continuation of the guardianship outweighs the interest of any parent of the minor in restoration of the parent's right to make decisions for the minor.

(b) A minor subject to guardianship or a person interested in the welfare of the minor may petition the court to terminate the guardianship, modify the guardianship, remove the guardian and appoint a successor guardian, or remove a standby guardian and appoint a different standby guardian.

(c) A petitioner under subsection (b) shall give notice of the hearing on the petition to the minor, if the minor is 12 years of age or older and is not the petitioner, the guardian, each parent of the minor, and any other person the court determines.

(d) The court shall follow the priorities in Section 206(b) when selecting a successor

guardian for a minor.

(e) Not later than 30 days after appointment of a successor guardian for a minor, the court shall give notice of the appointment to the minor subject to guardianship, if the minor is 12 years of age or older, each parent of the minor, and any other person the court determines.

(f) When terminating a guardianship for a minor under this section, the court may issue an order providing for transitional arrangements that will assist the minor with a transition of custody and is in the best interest of the minor.

(g) A guardian for a minor that is removed shall cooperate with a successor guardian to facilitate transition of the guardian's responsibilities and protect the best interest of the minor.

Comment

Subsection (a) lists the grounds for terminating a guardianship for a minor. It recognizes the traditional grounds for termination that were recognized in Section 210(a) of the 1997 act: the minor's death, adoption, emancipation, attainment of majority, or as ordered by the court. While a guardianship terminates upon emancipation of a minor, the grounds of emancipation are left to the state's law on the subject. In many states a minor is emancipated by marriage, military service, or order of emancipation.

Unlike the termination provisions in the 1997 act, this section requires the court to order termination where the court finds that that the original standard for appointing a guardian in Section 201 is not met. The only exception to this requirement is if termination would be harmful to the minor and the minor's interest in the guardianship continuing outweighs the interest of the minor's parents in having their rights restored. Thus, as a general matter, the fact that a guardian has been appointed in the past does not mean that the guardianship should continue. By way of example, consider a situation in which a guardian is appointed because the minor's only parent was incarcerated. Upon release, the parent petitions for termination of the guardianship. Upon review, the court should terminate the guardianship. The guardianship may continue only if the court finds that some other basis for imposition of guardianship exists under Section 201, or that termination would result in harm to the minor and the minor's interest in having a continued guardianship outweighs the parent's interest in resuming parental powers.

Termination of the guardianship does not relieve the guardian of all duties. Even though the guardianship is terminated, the guardian is still liable for previous acts and has an obligation to account for any funds of the minor within the guardian's possession or control. *See* Section 112(c).

Subsection (b) authorizes the minor or any person interested in the minor's welfare to seek

termination of the guardianship, an expansion of or restriction on the guardian's powers, removal of the guardian or standby guardian, and appointment of a successor guardian or different standby guardian. Pursuant to subsection (c), the petitioner must give notice of a petition under subsection (b) to the minor if the minor is at least 12 years old (and not the petitioner), the minor's parents, and any other person the court determines.

Subsection (d) requires the court to use the same priorities when selecting a successor guardian for a minor that it would use in appointing any other guardian for a minor.

Subsection (e) governs notice of the appointment of a successor guardian.

Subsections (f) and (g) address the transition to a new custodial or guardianship relationship. They authorize the court to order transitional arrangements to help the minor with a transition in custody. Subsection (g) requires a guardian for a minor to cooperate with a successor guardian to facilitate transition of responsibilities and protect the minor's interests.

[ARTICLE] 3

GUARDIANSHIP OF ADULT

SECTION 301. BASIS FOR APPOINTMENT OF GUARDIAN FOR ADULT.

(a) On petition and after notice and hearing, the court may:

(1) appoint a guardian for an adult if the court finds by clear-and-convincing evidence that:

(A) the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; and

(B) the respondent's identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative; or

(2) with appropriate findings, treat the petition as one for a conservatorship under [Article] 4 or protective arrangement under [Article] 5, issue any appropriate order, or dismiss the proceeding.

(b) The court shall grant a guardian appointed under subsection (a) only those powers necessitated by the demonstrated needs and limitations of the respondent and issue orders that will encourage development of the respondent's maximum self-determination and independence. The court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship, or other less restrictive alternatives would meet the needs of the respondent.

Comment

This section replaces Section 311(a) and (b) of the 1997 act. Placement of the basis for appointment at the start of Article 3 is designed to signal that this is a threshold question and to alert all parties, and the public more generally, to the strict standard necessary to impose guardianship on an adult. Unlike Section 311(a) and (b) of the 1997 act, this section does not speak of capacity and incapacity. Rather than being asked to assign a status (e.g., "incapacitated" or "has capacity") to the individual, the court is called upon to make particularized findings about the adult's individual needs in light of what the adult can and cannot do. This change is also consistent with the act's avoidance of the term "incapacitated person," which has been criticized as unnecessarily stigmatizing. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1199 (2012) (recommending, as part of Recommendation 1.7, that the term be avoided).

Under subsection (a)(1) of this section, a guardian may be appointed for an adult only if the court finds by clear-and-convincing evidence that: (1) the adult cannot meet essential requirements for physical health, safety, or self-care; (2) guardianship is the least restrictive approach to meeting the adult's identified need; and (3) the adult cannot receive and evaluate information or make or communicate decisions even with appropriate supportive services, technological assistance, or supported decision making. Thus, if the adult's needs could be met by providing the individual with support for decision making, adaptive devices, caregiving services, or a wide variety of other interventions that remove fewer rights than guardianship, the court may not impose a guardianship on an adult.

Subsection (a)(2) allows the court, with appropriate findings, to treat a petition for guardianship for an adult under this section as a petition for a protective arrangement instead of guardianship or conservatorship under Article 5, or a petition for conservatorship under Article 4, or to dismiss the Article 3 proceeding. To guarantee the respondent the maximum possible personal liberty, the court should treat the petition as one for a conservatorship or protective arrangement instead of conservatorship under this subsection whenever it concludes that court intervention is necessary and appropriate, but the respondent's needs can be met by the entry of orders with respect to the respondent's property without the need to limit the respondent's personal freedom.

As set forth under subsection (b), a guardian may never be granted powers that are not required

by the adult's demonstrated limitations and needs. Thus, most guardianships should be limited, not full, as almost all respondents possess some ability to act or make decisions on their own behalf.

Notably, this section provides the only grounds for appointment of a guardian for an adult. This is in contrast to Sections 301 through 303 of the 1997 act, which allowed for the appointment of a guardian of an adult by a will or other writing of the adult's spouse or parent. This act eliminates these alternative grounds, which are at odds with the act's overall commitment to due process and least-restrictive alternatives.

While the standard for appointment of a guardian for an adult under this section is similar to the standard for appointment of a conservator for an adult under Section 401, the two standards are distinct. The fact that one is satisfied does not indicate that the other is satisfied.

Overall, as in the 1997 act, the section's emphasis on less restrictive alternatives, a high evidentiary standard, and the use of limited guardianship is consistent with the act's philosophy that a guardian should be appointed only when necessary, only for as long as necessary, and with only the powers that are necessary.

SECTION 302. PETITION FOR APPOINTMENT OF GUARDIAN FOR ADULT.

(a) A person interested in an adult's welfare, including the adult for whom the order is sought, may petition for appointment of a guardian for the adult.

(b) A petition under subsection (a) must state the petitioner's name, principal residence, current street address, if different, relationship to the respondent, interest in the appointment, the name and address of any attorney representing the petitioner, and, to the extent known, the following:

(1) the respondent's name, age, principal residence, current street address, if different, and, if different, address of the dwelling in which it is proposed the respondent will reside if the petition is granted;

(2) the name and address of the respondent's:

(A) spouse [or domestic partner] or, if the respondent has none, an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period immediately before the filing of the petition;

(B) adult children or, if none, each parent and adult sibling of the respondent, or, if none, at least one adult nearest in kinship to the respondent who can be found with reasonable diligence; and

(C) adult stepchildren whom the respondent actively parented during the stepchildren's minor years and with whom the respondent had an ongoing relationship in the two-year period immediately before the filing of the petition;

(3) the name and current address of each of the following, if applicable:

(A) a person responsible for care of the respondent;

(B) any attorney currently representing the respondent;

(C) any representative payee appointed by the Social Security Administration for the respondent;

(D) a guardian or conservator acting for the respondent in this state or in another jurisdiction;

(E) a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary;

(F) any fiduciary for the respondent appointed by the Department of Veterans Affairs;

(G) an agent designated under a [power of attorney for health care] in which the respondent is identified as the principal;

(H) an agent designated under a power of attorney for finances in which the respondent is identified as the principal;

(I) a person nominated as guardian by the respondent;

(J) a person nominated as guardian by the respondent's parent or spouse

[or domestic partner] in a will or other signed record;

(K) a proposed guardian and the reason the proposed guardian should be selected; and

(L) a person known to have routinely assisted the respondent with decision making during the six months immediately before the filing of the petition;

(4) the reason a guardianship is necessary, including a brief description of:

(A) the nature and extent of the respondent's alleged need;

(B) any protective arrangement instead of guardianship or other less restrictive alternatives for meeting the respondent's alleged need which have been considered or implemented;

(C) if no protective arrangement instead of guardianship or other less restrictive alternatives have been considered or implemented, the reason they have not been considered or implemented; and

(D) the reason a protective arrangement instead of guardianship or other less restrictive alternative is insufficient to meet the respondent's alleged need;

(5) whether the petitioner seeks a limited guardianship or full guardianship;

(6) if the petitioner seeks a full guardianship, the reason a limited guardianship or protective arrangement instead of guardianship is not appropriate;

(7) if a limited guardianship is requested, the powers to be granted to the guardian;

(8) the name and current address, if known, of any person with whom the petitioner seeks to limit the respondent's contact;

(9) if the respondent has property other than personal effects, a general statement

of the respondent's property, with an estimate of its value, including any insurance or pension, and the source and amount of other anticipated income or receipts; and

(10) whether the respondent needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings.

Comment

This section lists the information that must be contained in the petition for appointment of a guardian. The comparable provisions of the 1997 act were located in Section 304 although this section adds further detail.

Although subsection (a) allows adults to petition for appointment of a guardian for themselves, the court should scrutinize such petitions closely to confirm that they are truly voluntary, and that petitioners fully understand the nature and consequences of petitioning. Normally, where an adult seeks to obtain assistance, it is preferable for the adult to execute a durable power of attorney, engage in supported decision making, or both.

Subsection (b)(1) requires the petitioner to state the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made or a guardianship instead of protective arrangement is ordered. This provision is designed to alert the respondent, and others who receive notice of the petition, of potential consequences of the guardianship that are likely to raise concerns. Giving the respondent, and those entitled to a copy of the petition under Section 303, full information will enable them to make more informed decisions about whether to oppose the petition, oppose appointment of the petitioner as guardian, or seek to limit the powers granted to the guardian.

Subsections (b)(2)-(3) require that the petition list family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 303. These persons will likely have the greatest interest in protecting the respondent and in making certain that the proposed guardianship is appropriate.

Subsection (b)(2)(A) requires that the petition contain the name and address of the respondent's spouse or domestic partner (if the enacting state uses the term) or, if none, then an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period immediately before the filing of the petition. This is a change from Section 304 of the 1997 act, which omitted the term domestic partner and required notice to a person with whom the respondent has resided for more than six months before the filing of the petition. By requiring shared household responsibilities, and not simply co-residence, the new language better captures the underlying intent of the provision: providing notice to individuals with whom the respondent has a close personal relationship.

Subsection (b)(2)(B) also requires that the petition contain the names and addresses of the respondent's adult children or, if none, parents and adult brothers and sisters or, if none, an adult

relative of the nearest degree in which a relation can be found. If there are no adult children, parents, or adult siblings and there are several adults of equal degree of kinship to the respondent, the name and address of one is all that is required, not the names and addresses of the members of the entire class.

Subsection (b)(2)(C) requires the petition to list adult stepchildren whom the respondent parented during their minority and with whom the respondent had an ongoing relationship in the two-year period immediately before the filing of the petition. This is an expansion from Section 304 of the 1997 act, which did not require notice to adult stepchildren, and is designed to better reflect the diversity of family structures.

Subsection (b)(3) requires the petition to list a series of other persons who must be provided notice, including existing agents, care providers, and decision-making supporters. Notice to such individuals of the pending guardianship proceeding, as required by Section 303, is especially critical for ascertaining whether a guardianship is necessary. For example, the court may conclude there is no need to appoint a guardian if a guardian has already been appointed in another jurisdiction, or if the respondent has executed a durable power of attorney for finances or health care.

Subsection (b)(4) emphasizes that guardianship is a last resort and that less restrictive alternatives are to be preferred. The petitioner is required to identify all less restrictive alternatives for meeting that respondent's alleged needs that have been considered or implemented, to justify any failure to pursue less restrictive alternatives, and to explain why less restrictive alternatives would not meet the respondent's alleged needs. These requirements serve to provide the court with important information relevant to whether guardianship is appropriate. These also prompt would-be petitioners to explore less restrictive alternatives.

Subsections (b)(5)-(7) encourage the petitioner to consider limited guardianship. The petition must state whether the petitioner seeks a limited or full guardianship, or a protective arrangement instead of guardianship. When requesting a full guardianship, the petition must state why a limited guardianship or protective arrangement instead of guardianship would not meet the respondent's needs. If a limited guardianship is requested, the petition must set out the recommended powers to be granted to the guardian. "If probate courts determine that a guardianship or conservatorship is necessary, the respondent's self-reliance, autonomy, and independence should be promoted by restricting the authority of the guardian or conservator to the minimum required for the situation, rather than routinely granting full powers of guardianship/conservatorship in every case." National Probate Court Standards 3.3.10 (2013).

Section (b)(8) requires the petitioner to list any person with whom the petitioner seeks to limit the respondent's contact. Subsection (b)(1) requires the petitioner to state the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made or the protective arrangement instead of guardianship is ordered. These provisions are designed to alert the respondent, and others who receive notice of the petition, of potential consequences of the guardianship that are especially likely to raise concerns. Giving the respondent, and those persons entitled to a copy of the petition under Section 303, full information will enable them to make more informed decisions about whether to support or oppose the petition for guardianship

or the appointment of the proposed guardian, and whether to seek to limit the powers granted to the guardian.

Subsection (b)(9) requires the petitioner to include a general statement of the respondent's property, including an estimated value, insurance and pension information, and information about other anticipated income or receipts. This information should be detailed to enable the court visitor to expeditiously complete the report required by Section 304, and to enable the court to determine whether a conservatorship is needed. An exception is made if the respondent's only property is personal effects, in which case a conservator would usually not be needed regardless of the adult's abilities and limitations.

Finally, subsection (b)(10), requires the petitioner to set forth respondent's need, if any, for an interpreter, translator, or other form of support to effectively communicate with the court or to understand court proceedings. Thus, if the respondent uses another person to assist with communication or comprehension, the petitioner should include this information.

To help petitioners satisfy the requirements of this section, Section 603 contains a sample petition form that petitioners may use.

SECTION 303. NOTICE OF HEARING FOR APPOINTMENT OF GUARDIAN FOR ADULT.

(a) On filing of a petition under Section 302 for appointment of a guardian for an adult, the court shall set a date, time, and place for hearing the petition.

(b) A copy of a petition under Section 302 and notice of a hearing on the petition must be served personally on the respondent. The notice must inform the respondent of the respondent's rights at the hearing, including the right to an attorney and to attend the hearing. The notice must include a description of the nature, purpose, and consequences of granting the petition. The court may not grant the petition if notice substantially complying with this subsection is not served on the respondent.

(c) In a proceeding on a petition under Section 302, the notice required under subsection (b) must be given to the persons required to be listed in the petition under Section 302(b)(1) through (3) and any other person interested in the respondent's welfare the court determines. Failure to give notice under this subsection does not preclude the court from appointing a

guardian.

(d) After the appointment of a guardian, notice of a hearing on a petition for an order under this [article], together with a copy of the petition, must be given to:

(1) the adult subject to guardianship;

(2) the guardian; and

(3) any other person the court determines.

Comment

This section is similar to Section 309 of the 1997 act except that subsection (d) of this section also addresses notice requirements for hearings on petitions filed after the appointment of a guardian.

On filing of the petition, subsection (a) requires that the court set a date, time, and place for the hearing. Subsection (b) requires that the respondent be personally served with the petition and notice of hearing. Failure to personally serve the respondent is jurisdictional, as is notice that does not substantially comply with the requirements of subsection (b). Notice of hearing must be given to the persons who are listed in the petition, but as provided in subsection (c) failing to give notice to those listed (other than the respondent) is not jurisdictional. The purpose of providing notice to the others listed in the petition is because they may have information that is useful to the court. They are not indispensable parties for the resolution of the case. If notice to them were made jurisdictional, the proceeding would have to be dismissed or continued if one of them could not be immediately located. This would delay and otherwise complicate the proceeding. The notice of hearing not only informs the respondent and others of the date of the hearing and the contents of the petition, but it must also include a statement of rights. Subsection (b) requires that the notice inform the respondent of the respondent's rights at the hearing, including the right to an attorney and the right to attend the hearing. The notice must also include a description of the nature, purpose, and consequences of granting the petition.

Subsection (d) addresses the notice requirements for hearings on petitions for orders subsequent to the appointment of a guardian for an adult.

The adult subject to guardianship, the guardian, and anyone else the court directs, must be given copies of any notice of hearing and a copy of any petition. This provision helps ensure that the adult is kept informed of developments. In its original guardianship order, the court should direct notice of future hearings be given to any other party who, in the court's view, will help to monitor the guardian and protect the interest of the person subject to guardianship. Subsection (d) is closely related to Section 310(e), which provides that as part of an order establishing the guardianship, the court must identify persons subsequently entitled to notice of the various actions listed in Sections 310(e) and 311.

Notice under this section is also governed by the general notice requirements for hearings under Section 113, which requires that notice be given at least 14 days prior to the hearing.

SECTION 304. APPOINTMENT AND ROLE OF [VISITOR].

(a) On receipt of a petition under Section 302 for appointment of a guardian for an adult, the court shall appoint a [visitor]. The [visitor] must be an individual with training or experience in the type of abilities, limitations, and needs alleged in the petition.

(b) A [visitor] appointed under subsection (a) shall interview the respondent in person and, in a manner the respondent is best able to understand:

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing on the petition, and the general powers and duties of a guardian;

(2) determine the respondent's views about the appointment sought by the petitioner, including views about a proposed guardian, the guardian's proposed powers and duties, and the scope and duration of the proposed guardianship;

(3) inform the respondent of the respondent's right to employ and consult with an attorney at the respondent's expense and the right to request a court-appointed attorney; and

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, may be paid from the respondent's assets.

(c) The [visitor] appointed under subsection (a) shall:

(1) interview the petitioner and proposed guardian, if any;

(2) visit the respondent's present dwelling and any dwelling in which it is reasonably believed the respondent will live if the appointment is made;

(3) obtain information from any physician or other person known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and

(4) investigate the allegations in the petition and any other matter relating to the petition the court directs.

(d) A [visitor] appointed under subsection (a) promptly shall file a report in a record with the court, which must include:

(1) a recommendation whether an attorney should be appointed to represent the respondent;

(2) a summary of self-care and independent-living tasks the respondent can manage without assistance or with existing supports, could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making, and cannot manage;

(3) a recommendation regarding the appropriateness of guardianship, including whether a protective arrangement instead of guardianship or other less restrictive alternative for meeting the respondent's needs is available and:

(A) if a guardianship is recommended, whether it should be full or limited; and

(B) if a limited guardianship is recommended, the powers to be granted to the guardian;

(4) a statement of the qualifications of the proposed guardian and whether the respondent approves or disapproves of the proposed guardian;

(5) a statement whether the proposed dwelling meets the respondent's needs and whether the respondent has expressed a preference as to residence;

(6) a recommendation whether a professional evaluation under Section 306 is necessary;

(7) a statement whether the respondent is able to attend a hearing at the location court proceedings typically are held;

(8) a statement whether the respondent is able to participate in a hearing and which identifies any technology or other form of support that would enhance the respondent's ability to participate; and

(9) any other matter the court directs.

Legislative Note: *The term "visitor" is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.*

Comment

Subsection (a) requires the court to appoint a visitor upon receipt of a petition under Section 302. "Visitor" is bracketed in recognition that states use, and may wish to substitute, different words to refer to this position. This section is similar to Section 305(c)-(e) of the 1997 act except that the responsibilities of the visitor have been adjusted to accommodate changes in the petition requirements and other changes in this act in the procedure for appointing a guardian.

Visitors may be selected from a variety of professions. Visitors may include, among others, physicians, psychologists, social workers, or nurses, among others. Regardless of the visitor's profession, subsection (a) requires that the visitor have training and experience in the type of abilities, limitations, and needs alleged in the petition. This training and experience should be sufficient so that the visitor may serve as the "eyes and ears" of the court. Thus, for example, a visitor appointed for a respondent alleged to have Alzheimer's disease must have training or experience in assessing the needs of those with Alzheimer's disease. As the appropriate disposition of the petition may well depend on what services are available to the respondent, the visitor should also be knowledgeable about less restrictive alternatives, including supportive services in the respondent's community. As the visitor's role is to provide objective information to the court, it is essential that the visitor not have a conflict of interest. For example, the visitor should not be an employee of an institution where the respondent resides. Similarly, the petitioner should not nominate a visitor, and any such nomination should be disregarded by the court.

Under subsection (b), the visitor is tasked with interviewing the respondent in person and explaining to the respondent the nature and potential consequences of the petition and the respondent's rights. The visitor must determine the respondent's views about the appointment or order sought. This includes the respondent's views about any proposed guardian, as such views will help the court to determine who—if anyone—to appoint as guardian consistent with Section 309(a)(2) and (b). The visitor should communicate in plain language and in a language in which the respondent is proficient or be accompanied by a qualified and disinterested interpreter. While the visitor is not required to speak the respondent's primary language, it is best practice to

use visitors who do. Where this is not practicable, then both good practice and due process dictate the use of interpreters so the respondent can understand and communicate. If assistive devices are needed for the visitor to explain to the respondent in a manner the respondent can understand, or for the respondent to communicate with the visitor, then the visitor should use those assistive devices.

Under subsection (c), the visitor is also tasked with interviewing the petitioner and the proposed guardian, visiting the respondent's present dwelling and any dwelling in which it is reasonably believed that the respondent will live if the appointment is made; obtaining information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and investigating the allegations in the petition and any other matter relating to the petition the court directs.

As set forth in subsection (d), the visitor is responsible for reporting to the court on a variety of matters about which the court will need information to act on the petition. The visitor's report must be in a record and include a list of recommendations and statements. Specifically, the visitor's report must provide information and recommendations to the court regarding the respondent's needs, the appropriateness of the guardianship, whether less restrictive alternatives might meet the respondent's needs and what supports might be necessary to enhance the respondent's abilities, recommendations about further evaluations, powers to be given the guardian, and the advisability of appointment of independent counsel for the respondent. For states enacting Alternative A to Section 305(a), if the visitor does not recommend that an attorney be appointed, the visitor should include in the report the reasons why an attorney need not be appointed. States enacting this act should consider developing a checklist for visitors containing the required items enumerated in subsection (d).

The visitor should talk with the respondent's physician or other person who is known to have assessed, treated, or advised about the respondent's relevant physical or mental condition. This information is crucial to the court in determining whether to grant the petition because a professional evaluation is not required in every case. If the physician or other health-care or other treating professional refuses to talk to the visitor because of a concern that such a conversation would violate HIPAA or for other reason, the visitor may need to seek from the appointing court an order authorizing the release of information from that physician or professional.

If the petition is withdrawn prior to the appointment of a visitor, no appointment of a visitor is necessary.

While appointment of a visitor is not without financial cost, visitors may reduce the states' overall costs by discovering information that avoids unnecessary guardianships. Courts faced with limited resources may also wish to consider using volunteer visitor programs. *See* Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community, which was published by the American Bar Association Commission on Law and Aging in 2011.

SECTION 305. APPOINTMENT AND ROLE OF ATTORNEY FOR ADULT.

Alternative A

(a) The court shall appoint an attorney to represent the respondent in a proceeding for appointment of a guardian for an adult if:

(1) the respondent requests an appointment;

(2) the [visitor] recommends an appointment; or

(3) the court determines the respondent needs representation.

Alternative B

(a) Unless the respondent in a proceeding for appointment of a guardian for an adult is represented by an attorney, the court shall appoint an attorney to represent the respondent, regardless of the respondent's ability to pay.

End of Alternatives

(b) An attorney representing the respondent in a proceeding for appointment of a guardian for an adult shall:

(1) make reasonable efforts to ascertain the respondent's wishes;

(2) advocate for the respondent's wishes to the extent reasonably ascertainable; and

(3) if the respondent's wishes are not reasonably ascertainable, advocate for the result that is the least restrictive in type, duration, and scope, consistent with the respondent's interests.

Legislative Note: *A state that enacts Alternative B of subsection (a) should not enact Section 304(d)(1).*

Comment

Similar to Section 305(a) of the 1997 act, alternative provisions on the appointment of an

attorney for the respondent are offered in subsection (a). Alternative A relies on the use of a "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of an attorney, nevertheless, is *required* under Alternative A when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor. Alternative A is in accord with the National Probate Court Standards, Standard 3.3.5 "Appointment of Counsel" (2013), which provides:

> (a) Counsel should be appointed by the probate court to represent the respondent when:
> (1) requested by an unrepresented respondent;
> (2) recommended by a court visitor;
> (3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
> (4) otherwise required by law.
> (b) The role of counsel should be that of an advocate for the respondent.

It is expected that courts in states enacting Alternative A of subsection (a), will appoint counsel in virtually all cases in which the respondent would otherwise be unrepresented. In such jurisdictions, courts should err on the side of protecting the respondent's rights by finding, absent a compelling reason otherwise, that the respondent needs representation. A guardianship proceeding can involve complex legal issues and can strip the adult of many of the most basic rights. It should be the rare case in which the court does not find that an unrepresented respondent is in need of representation. Visitors in such jurisdictions should also be sensitive to the fact that the respondent may lack the ability to knowingly waive appointment of counsel.

In light of these concerns and in the interest of providing full due process to respondents, states may wish instead to adopt Alternative B, which provides for mandatory appointment of counsel. Mandatory appointment has been strongly urged by the A.B.A. Commission on Law and Aging (formerly known as the A.B.A. Commission on Legal Problems of the Elderly) and helps ensure that the respondent's rights are fully represented and protected in the proceeding.

Subsection (b), which is new to the act, specifies the role of the attorney for the respondent, regardless of whether the state has chosen alternative A or B. It specifies that the attorney must make reasonable efforts to ascertain what the respondent wishes and must advocate for those wishes. This has the effect of directing the attorney to maintain a normal attorney-client relationship with the respondent. A.B.A. Model Rule of Professional Conduct 1.14, which is also applicable here, directs the attorney to maintain, as far as reasonably possible, a normal attorney-client relationship with a client of diminished capacity, and provides guidance on what may be done if maintaining a normal attorney-client relationship becomes difficult. Subsection (b) is also in accord with National Probate Court Standards, Standard 3.3.5 "Appointment of Counsel" (2013) with respect to the role of counsel.

SECTION 306. PROFESSIONAL EVALUATION.

(a) At or before a hearing on a petition for a guardianship for an adult, the court shall order a professional evaluation of the respondent:

(1) if the respondent requests the evaluation; or

(2) in other cases, unless the court finds that it has sufficient information to determine the respondent's needs and abilities without the evaluation.

(b) If the court orders an evaluation under subsection (a), the respondent must be examined by a licensed physician, psychologist, social worker, or other individual appointed by the court who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations and will not be advantaged or disadvantaged by a decision to grant the petition or otherwise have a conflict of interest. The individual conducting the evaluation promptly shall file report in a record with the court. Unless otherwise directed by the court, the report must contain:

(1) a description of the nature, type, and extent of the respondent's cognitive and functional abilities and limitations;

(2) an evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(3) a prognosis for improvement and recommendation for the appropriate treatment, support, or habilitation plan; and

(4) the date of the examination on which the report is based.

(c) The respondent may decline to participate in an evaluation ordered under subsection (a).

Comment

Like the 1997 act, this act does not require a professional evaluation in all cases before the court appoints a guardian. It thus continues the 1997 act's departure from the predecessor 1982 Uniform Guardianship and Protective Proceedings Act (UGPPA), which mandated professional evaluations. *See* UGPPA (1982) Section 2-203(b) (UPC Section 5-303(b) (1982)).

A professional evaluation is required in two circumstances. First, as under Section 306 of the 1997 act, subsection (a)(1) of this section mandates a professional evaluation when demanded by the respondent. When represented by counsel, the respondent may demand the evaluation through counsel. If the respondent is truly incapacitated and not represented by counsel, it is unlikely that the respondent will demand an evaluation. However, the court still can order a professional evaluation either on the visitor's recommendation or on its own motion.

Second, subsection (a)(2) mandates a professional evaluation in other cases unless the court explicitly finds it has sufficient information to determine both the respondent's needs and abilities without that evaluation. This requirement was not in the 1997 act, but was consistent with instruction provided in the Comment to Section 306 of that act indicating that professional evaluations should be the default.

Consistent with this new requirement, a court should order a professional evaluation any time the nature and scope of the respondent's abilities, limitations, and needs are not absolutely clear based on its own assessment and on the visitor's report. By providing the court with an expert evaluation of the respondent's abilities and limitations, the professional evaluation not only helps the court determine whether a guardianship is necessary, but also helps the court determine how to craft an appropriate limited guardianship.

If an evaluation is ordered, subsection (b) requires it to be performed by a professional who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations. The act extends the list of examples of types of individuals who might reasonably conduct a professional evaluation beyond that listed in Section 306 of the 1997 act to include social workers; this expansion recognizes that, in some cases, a social worker may be well suited for this task.

Unlike the 1997 act, this act requires the professional evaluation to do more than merely assess the individual's deficits. The evaluator must also assess the individual's abilities. This is important because an individual's functional needs will likely reflect the interaction between abilities and limitations. As part of the evaluation described in subsection (b), the professional evaluator should generally include a summary of the consultation with the respondent's treating physician.

Subsection (c) recognizes the right of the respondent to decline to participate in the evaluation. A respondent might so decline because of concern about undue invasion of privacy. However, if the respondent refuses participation, the court will have less information on which to base its conclusion. For respondents who wish to avoid imposition of a guardianship, this may be particularly problematic as the bulk of the court's information may be supplied by the petitioner.

SECTION 307. ATTENDANCE AND RIGHTS AT HEARING.

(a) Except as otherwise provided in subsection (b), a hearing under Section 303 may not proceed unless the respondent attends the hearing. If it is not reasonably feasible for the

respondent to attend a hearing at the location court proceedings typically are held, the court shall make reasonable efforts to hold the hearing at an alternative location convenient to the respondent or allow the respondent to attend the hearing using real-time audio-visual technology.

(b) A hearing under Section 303 may proceed without the respondent in attendance if the court finds by clear-and-convincing evidence that:

(1) the respondent consistently and repeatedly has refused to attend the hearing after having been fully informed of the right to attend and the potential consequences of failing to do so; or

(2) there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance.

(c) The respondent may be assisted in a hearing under Section 303 by a person or persons of the respondent's choosing, assistive technology, or an interpreter or translator, or a combination of these supports. If assistance would facilitate the respondent's participation in the hearing, but is not otherwise available to the respondent, the court shall make reasonable efforts to provide it.

(d) The respondent has a right to choose an attorney to represent the respondent at a hearing under Section 303.

(e) At a hearing held under Section 303, the respondent may:

(1) present evidence and subpoena witnesses and documents;

(2) examine witnesses, including any court-appointed evaluator and the [visitor]; and

(3) otherwise participate in the hearing.

(f) Unless excused by the court for good cause, a proposed guardian shall attend a hearing

under Section 303.

(g) A hearing under Section 303 must be closed on request of the respondent and a showing of good cause.

(h) Any person may request to participate in a hearing under Section 303. The court may grant the request, with or without a hearing, on determining that the best interest of the respondent will be served. The court may impose appropriate conditions on the person's participation.

Comment

Section 308 of the 1997 act required both the respondent and proposed guardian to attend the hearing unless attendance of either was excused for good cause. This section continues the good cause standard for excusing attendance by the proposed guardian. But due to the importance of attendance by the respondent and a concern that a good cause standard was open to abuse, the revised section spells out in greater detail the circumstances when attendance by the respondent will be excused.

Subsection (a) provides that, except under the unusual circumstances set forth in subsection (b), no hearing on a petition for guardianship may proceed without the presence of the respondent. The fact that the respondent may not be able to attend the hearing at the location where the court normally conducts hearings does not justify holding the hearing without the respondent. Rather, the court must try to hold the hearing at a location that the respondent can attend or by using real-time, audio-visual technology. As a general matter, it is preferable to do the former, as in-person interactions will allow the court to observe the respondent's context, which can help the court to understand factors that may be influencing the respondent's behavior and communications. However, real-time, audio-visual technology can provide a reasonable alternative in appropriate situations if the technology allows both the court and respondent to communicate with one another to the best of their abilities.

The exceptions in subsection (b) to the requirement that the respondent must attend the hearing are deliberately very narrow. In order for the hearing to proceed without the respondent in attendance, the court must find at least one of two things by clear-and-convincing evidence.

The first exception is that the respondent consistently and repeatedly refused to attend the hearing despite being fully informed of the right to attend and potential consequences of not doing so. Thus, for example, a respondent who cannot physically access the courthouse where the hearing is scheduled must understand that she has a right to have the hearing held at an alternative location or by using real-time, audio-visual technology. The respondent should also understand that a guardian could be appointed for her in her absence, and that this appointment could strip her of the right to make important, personal decisions for herself. Among the

responsibilities of the visitor listed in Section 304(b) is a requirement that the visitor explain the effect of the proceeding, the respondent's rights at the hearing, and general powers of a guardian.

The second exception is that there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance. Both parts of this requirement—that the respondent cannot practically attend and that the respondent cannot participate even with support—must be fully satisfied for this exception to apply. The exception should be used very sparingly as best practice is to hold the hearing in the presence of the respondent regardless of the respondent's abilities. Without the respondent's presence the court is relying on third-party information to determine that it is in fact not feasible for the respondent to attend and that the respondent is not being prevented from attending for some other reason. Especially where this information is presented by the petitioner, or does not include a professional evaluation, courts should be extremely hesitant to rely on it to excuse the respondent's presence.

The respondent has the right to take an active role in the hearing, as detailed in subsection (e). Subsection (c) recognizes that to exercise this right, the respondent may need assistance. It therefore provides that the respondent has a right to assistance at the hearing and places an affirmative duty on the court to take reasonable measures to facilitate the respondent receiving that assistance.

As indicated in subsection (d), the respondent has a right to choose an attorney to represent the respondent at the hearing. The respondent is free to choose an attorney other than the one who would otherwise be appointed by the court. This provision does not govern payment of the attorney. That issue is addressed in Section 119.

Subsection (f) requires the proposed guardian to attend the hearing. The court may excuse the proposed guardian's attendance but this should be rare. This provision is consistent with a recommendation from National Probate Court Standards, Standard 3.3.8(G), "Hearing" (2013). The proposed guardian's presence at the hearing gives the court the opportunity to determine the person's appropriateness for appointment and to make any other inquiry of the person that the court deems to be appropriate, as well as to emphasize to the proposed guardian the gravity of the guardian's responsibilities.

Under subsection (g), the respondent can request that the hearing be closed, but the court may grant the request only upon a showing of good cause.

Under subsection (h), others may request to participate, which the court can approve without a hearing if the court finds the respondent's best interest is served by the participation. The court's order granting the request to participate may include appropriate conditions or limitations.

SECTION 308. CONFIDENTIALITY OF RECORDS.

(a) The existence of a proceeding for or the existence of a guardianship for an adult is a matter of public record unless the court seals the record after:

(1) the respondent or individual subject to guardianship requests the record be sealed; and

(2) either:

(A) the petition for guardianship is dismissed; or

(B) the guardianship is terminated.

(b) An adult subject to a proceeding for a guardianship, whether or not a guardian is appointed, an attorney designated by the adult, and a person entitled to notice under Section 310(e) or a subsequent order are entitled to access court records of the proceeding and resulting guardianship, including the guardian's plan under Section 316 and report under Section 317. A person not otherwise entitled to access court records under this subsection for good cause may petition the court for access to court records of the guardianship, including the guardian's report and plan. The court shall grant access if access is in the best interest of the respondent or adult subject to guardianship or furthers the public interest and does not endanger the welfare or financial interests of the adult.

[(c) A report under Section 304 of a [visitor] or a professional evaluation under Section 306 is confidential and must be sealed on filing, but is available to:

(1) the court;

(2) the individual who is the subject of the report or evaluation, without limitation as to use;

(3) the petitioner, [visitor], and petitioner's and respondent's attorneys, for purposes of the proceeding;

(4) unless the court orders otherwise, an agent appointed under a [power of attorney for health care] or power of attorney for finances in which the respondent is the

principal; and

(5) any other person if it is in the public interest or for a purpose the court orders for good cause.]

Legislative Note: *Subsection (c) is bracketed in recognition that states have different policies and procedures regarding the sealing of court records.*

Comment

Guardianship involves highly personal and other data. It is important that the respondent's privacy be protected before and after the appointment. Furthermore, data found in guardianship records, such as Social Security numbers and information concerning financial accounts, can be used to facilitate fraud. Concern about access by the general public has increased as electronic filing of court records has made these records more accessible.

On the other hand, public access is important. One criticism of guardianship in some states is that too much happens behind closed doors. The public, and "watch-dog" groups in particular, want to know how the guardianship system is functioning. In addition, this act encourages family and others interested in the welfare of the respondent to participate in the proceeding, both before and after the appointment. Sections 302 and 303 taken together require that notice of the proceeding be given to family and others whose participation might enhance the proceeding. Section 310(e) encourages the court to establish a list of family and other persons to receive notice of various actions following the appointment. In order for these persons to effectively monitor the guardianship, they need access to records. However, with the move to electronic filing and increasing concerns about protecting sensitive information, more courts are limiting access to guardianship records to the immediate parties and their counsel.

This section attempts to balance these conflicting policy concerns. Subsection (a) provides that the existence of the guardianship case itself is a matter of public record. But even then, similar to the expungement of criminal records, the court has the authority to seal even the existence of the guardianship if the subject of the proceeding so requests and either the petition for guardianship was dismissed or, if a guardian was appointed, the guardianship is terminated.

Subsection (b) addresses access to the underlying records of the guardianship. In addition to the adult and the adult's attorney, access is granted to persons entitled to notice under Section 310(e), including the guardian's plan under Section 316 and report under Section 317. Other persons must petition for access. The court shall grant the petitioner access if access is in the best interest of the adult or is in furtherance of the public interest and does not endanger the welfare or financial interests of the adult.

The documents most likely to contain highly sensitive information is the visitor report under Section 304 and professional evaluation under Section 306. Consequently, access to these documents is more restricted than other documents filed, which are covered by subsection (b). Pursuant to subsection (c), access to the visitor or evaluation report is available only to the court,

the individual who is the subject of the proceeding and that individual's attorney, the petitioner and petitioner's attorney, and the visitor. Access is also available to agents under powers of attorney for health care or finances unless the court orders otherwise, and to other persons if the court determines it is in the public interest or for other good cause. A partial or complete redaction of sensitive personal or financial information may be a practical solution for courts in balancing the need for disclosure to the public and the interests of family and friends, with the need to protect the individual's privacy and avoid misuse of sensitive data.

Subsection (c) is similar to Section 307 of the 1997 act, but because states vary considerably on their policies with regard to confidentiality in guardianship cases, subsection (c) has been placed in brackets, signaling that states are free to modify the language to match their local practice.

SECTION 309. WHO MAY BE GUARDIAN FOR ADULT; ORDER OF PRIORITY.

(a) Except as otherwise provided in subsection (c), the court in appointing a guardian for an adult shall consider persons qualified to be guardian in the following order of priority:

(1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in another jurisdiction;

(2) a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a power of attorney;

(3) an agent appointed by the respondent under [a power of attorney for health care];

(4) a spouse [or domestic partner] of the respondent; and

(5) a family member or other individual who has shown special care and concern for the respondent.

(b) If two or more persons have equal priority under subsection (a), the court shall select as guardian the person the court considers best qualified. In determining the best qualified person, the court shall consider the person's relationship with the respondent, the person's skills, the expressed wishes of the respondent, the extent to which the person and the respondent have

similar values and preferences, and the likelihood the person will be able to perform the duties of a guardian successfully.

(c) The court, acting in the best interest of the respondent, may decline to appoint as guardian a person having priority under subsection (a) and appoint a person having a lower priority or no priority.

(d) A person that provides paid services to the respondent, or an individual who is employed by a person that provides paid services to the respondent or is the spouse, [domestic partner,] parent, or child of an individual who provides or is employed to provide paid services to the respondent, may not be appointed as guardian unless:

(1) the individual is related to the respondent by blood, marriage, or adoption; or

(2) the court finds by clear-and-convincing evidence that the person is the best qualified person available for appointment and the appointment is in the best interest of the respondent.

(e) An owner, operator, or employee of [a long-term-care institution] at which the respondent is receiving care may not be appointed as guardian unless the owner, operator, or employee is related to the respondent by blood, marriage, or adoption.

Legislative Note: *Each state enacting the act needs to insert in subsection (e) the particular term or terms used in the state or statutory references for facilities considered long-term care institutions.*

Comment

This section specifies who has priority for appointment as guardian (subsection (a)), specifies how to resolve a dispute if two or more persons have an equal priority (subsection (b)), empowers the court to select someone with lower priority in appropriate circumstances (subsection (c)), and specifies certain caregivers and others who are automatically disqualified from being appointed as guardian (subsections (d)-(e)).

Subsection (a) of this section gives top priority for appointment as guardian to a guardian who has already been appointed for the adult by another court. Existing guardians are granted first

priority for two reasons. First, some cases will involve transfers of a guardianship from another state. To assure a smooth transition, the currently appointed guardian, whether appointed in this state or another, should have priority for appointment at the new location. Second, other cases will involve situations where a guardianship appointment is sought despite the appointment in another place. Granting the existing guardian priority will deter such forum shopping. If the existing guardian is inappropriate for some reason, subsection (c) permits the court to pass over the existing guardian and appoint another with or without priority. This approach is consistent with the Uniform Adult Guardianship and Protective Proceeding Jurisdiction Act's respect for out-of-state appointments

While an existing guardian is generally granted a first priority for appointment, a temporary substitute guardian and an emergency guardian are excluded from priority because of the short-term nature of their involvement and because their appointment may have been made with a less thorough and inclusive process than that required for a guardian appointed for an indefinite period.

Subsection (a)(2) grants a second priority to a person nominated as guardian by the respondent. The nomination may include anyone nominated orally at the hearing or communicated to the visitor, if the respondent is able to express a preference. The nomination may also be made by a separate document. While it is generally good practice for an individual to nominate as the guardian the agent named in a power of attorney for health care, subsection (a)(3) grants such an agent a third priority for appointment even in the absence of a specific nomination. The agent is granted priority on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a guardianship to thwart the authority of the agent. To assure that the agent will be in a position to assert this priority, Section 302 and Section 303 work together to require that the agent receive notice of the proceeding.

Subsection (a)(4) grants a fourth priority to the respondent's spouse or domestic partner but the section does not otherwise grant a priority to specific relatives. Rather, subsection (a)(5) gives a final level of priority to any family member or other person who has shown special care and concern for the respondent. This section represents a significant change from Section 310 of the 1997 act, which also created a priority for an adult child followed by a parent. The decision to collapse the strict kinship hierarchy into a single category other than for the spouse or domestic partner reflects a recognition that the court should favor those who have shown care for and about the respondent, an understanding that the act should be sensitive to respondents' diverse family structures and systems, and a concern that a strict hierarchy based on kinship may result in appointments that are not in the best interest of respondents.

Subsection (b) provides the court with a framework for selecting among persons with equal priority. This framework is especially important given the collapse of the detailed family hierarchy into a single category in subsection (a)(4) for the spouse or domestic partner with all other family members and others who have shown special care and concern for the respondent having equal priority under subsection (a)(5). Under subsection (b), a court shall choose the best qualified person when selecting among those with equal priority. In determining who is best qualified, the court should consider the potential guardian's relationship with the respondent, the

potential guardian's skills, the expressed wishes of the respondent, the extent to which the potential guardian and the respondent have similar values and preferences, and the likelihood that the potential guardian will be able to successfully perform the duties of a guardian, including the ability to periodically visit the adult subject to guardianship. Thus, whether a person is best qualified depends, in large part, on the quality of their relationship with the respondent. Since surrogate decision makers typically make the decisions for others that they would want made for themselves, requiring the court to consider the extent to which the potential guardian and the respondent share values and preferences increases the likelihood that the selected guardian will make the decision the individual subject to guardianship would have made if able. *See* Nina A. Kohn, *Matched Values & Preferences: A New Approach to Selecting Legal Surrogates*, 22 SAN DIEGO L. REV. 399 (2015).

Consistent with respecting the wishes of the individual and appointing a person who understands the adult's values and preferences, courts should resist the temptation to appoint a professional guardian simply because it is difficult to choose among family members and friends. While a professional guardian avoids the need to select between family members who are feuding or who are otherwise in disagreement, appointment of a professional is likely not to be consistent with the adult's wishes. The extensive literature on surrogate decision-making shows that people typically prefer to have decisions made by close family members. *See id*. In addition, appointment of a professional guardian comes at significant financial cost to the adult.

Subsection (d) prohibits the appointment as guardian of persons who provide paid services to respondents, as well as the affiliates of those who provide paid services, except in specific circumstances where such an appointment is appropriate. Subsection (e) more specifically prohibits appointment of an owner, operator, or employee of a long-term care institution at which the respondent is receiving care from being appointed as guardian unless related to the respondent by blood, marriage, or adoption. Strict application of these subsections is crucial to avoid a conflict of interest and to protect the individual subject to guardianship.

SECTION 310. ORDER OF APPOINTMENT FOR GUARDIAN.

(a) A court order appointing a guardian for an adult must:

(1) include a specific finding that clear-and-convincing evidence established that the identified needs of the respondent cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative, including use of appropriate supportive services, technological assistance, or supported decision making;

(2) include a specific finding that clear-and-convincing evidence established the respondent was given proper notice of the hearing on the petition;

(3) state whether the adult subject to guardianship retains the right to vote and, if

the adult does not retain the right to vote, include findings that support removing that right [which must include a finding that the adult cannot communicate, with or without support, a specific desire to participate in the voting process]; and

(4) state whether the adult subject to guardianship retains the right to marry and, if the adult does not retain the right to marry, include findings that support removing that right.

(b) An adult subject to guardianship retains the right to vote unless the order under subsection (a) includes the statement required by subsection (a)(3). An adult subject to guardianship retains the right to marry unless the order under subsection (a) includes the findings required by subsection (a)(4).

(c) A court order establishing a full guardianship for an adult must state the basis for granting a full guardianship and include specific findings that support the conclusion that a limited guardianship would not meet the functional needs of the adult subject to guardianship.

(d) A court order establishing a limited guardianship for an adult must state the specific powers granted to the guardian.

(e) The court, as part of an order establishing a guardianship for an adult, shall identify any person that subsequently is entitled to:

(1) notice of the rights of the adult under Section 311(b);

(2) notice of a change in the primary dwelling of the adult;

(3) notice that the guardian has delegated:

(A) the power to manage the care of the adult;

(B) the power to make decisions about where the adult lives;

(C) the power to make major medical decisions on behalf of the adult;

(D) a power that requires court approval under Section 315; or

(E) substantially all powers of the guardian;

(4) notice that the guardian will be unavailable to visit the adult for more than two months or unavailable to perform the guardian's duties for more than one month;

(5) a copy of the guardian's plan under Section 316 and the guardian's report under Section 317;

(6) access to court records relating to the guardianship;

(7) notice of the death or significant change in the condition of the adult;

(8) notice that the court has limited or modified the powers of the guardian; and

(9) notice of the removal of the guardian.

(f) A spouse[, domestic partner,] and adult children of an adult subject to guardianship are entitled to notice under subsection (e) unless the court determines notice would be contrary to the preferences or prior directions of the adult subject to guardianship or not in the best interest of the adult.

Legislative Note: *The bracketed language in subsection (a)(3) may conflict with an enacting state's existing law relating to voting rights and a state should consider whether the language is consistent with the state's policy preference.*

Comment

This section explains what must be included in a court's order appointing a guardian, and the consequences of certain omissions in that order. It contains provisions that are critical both to ensuring that guardianship orders are properly limited and that parties are aware of the consequences of an appointment. In addition, it contains provisions that facilitate guardianship monitoring. The section is an update and considerable expansion of Section 311 of the 1997 act.

Subsection (a) requires any court appointing a guardian for an adult to specifically state its finding that there is clear-and-convincing evidence that the respondent's identified needs cannot be met by a protective arrangement or other less restrictive alternative. The court must also include a specific finding that there was clear-and-convincing evidence the respondent was given proper notice.

In addition, subsection (a) requires the court to state whether the adult retains the right to vote and to marry and, if not, findings that support removal these rights. These provisions recognize

that the right to vote and the right to marry are fundamental rights and should not be removed without a compelling reason. In the case of voting, the bracketed language in subsection (a)(3) requires that the court find that the adult "cannot communicate, with or without support, a specific desire to participate in the voting process." This standard is adapted from the standard for removal of voting rights recommended by an expert group assembled by the University of the Pacific, McGeorge School of Law, the Borchard Foundation Center on Law and Aging, and the American Bar Association Commission on Law and Aging as part of a 2006 symposium entitled "Facilitating Voting As People Age: Implications of Cognitive Impairment," McGeorge Law Review, Vol. 38, Issue 4 (2006). The American Bar Association subsequently adopted this standard as part of its policy on voting rights. Resolution 121, adopted at the 2007 American Bar Association Annual Meeting.

Subsection (b) explains the consequences of the court not addressing voting rights, or the right to marry in the order, or of failing to do so in the way required by subsection (a). If the court does not state whether the adult retains the right to vote or marry, or states that the adult does not retain the right to vote or marry but does not make the necessary findings to support that restriction, the adult retains that right.

Subsection (c) requires a court creating a full guardianship for an adult to clearly state the reason for doing so, as well as to provide specific findings that support its conclusion that a limited guardianship would be inappropriate. This provision is designed to ensure that courts engage in thorough fact-finding and consider less restrictive alternatives and approaches to tailor orders before appointing a full guardian. It also recognizes that it has often been—as a practical matter—easier for courts to appoint a full guardian than a limited one because the former has often allowed the court to avoid the need to make a lengthy finding as to specific rights retained, and to secure additional assessments if needed. Requiring additional fact finding for imposition of full guardianships helps counter such perverse incentives.

Subsection (d) requires a court order establishing a limited guardianship for an adult to clearly state the powers that are being granted to the guardian. This statement will then define the scope of the guardianship. It is important for third parties relying on the order to easily ascertain the guardian's powers. In addition to a clear statement in the order, Section 108(c) requires that any limitations on the guardian's powers must be stated on the letters of office.

Subsection (e) requires the court appointing a guardian for an adult to identify any person entitled to notice of the rights of the adult, a copy of the guardian's plan, access to records related to the guardianship, notice of changes in the appointment, and notice of certain important events that may occur in the life of the adult or in the course of the guardianship. The events include a change in the adult's primary dwelling, the guardian delegating certain important powers, and the guardian's unavailability to perform key duties.

Subsection (f) requires that the spouse, domestic partner, and adult children of the adult be included in the list of persons entitled to notice under subsection (e) unless the court makes an explicit finding that this would be inconsistent with the preferences or prior directions of the adult, or otherwise not in the adult's best interest. Thus, the default is that the spouse, domestic partner, and adult children are entitled to this notice. It should only be the rare case in which the

court does not grant the right to such notice to all persons in these categories. Moreover, where a court is concerned about a particular family member receiving particular information, the court should simply limit the right to that information—and not the right to all information identified in subsection (e).

Subsection (e) represents an important innovation in this act. It leverages the interest of private individuals to monitor guardianships at minimal cost to the public by requiring courts to—absent good cause—order that guardians give to the adult's family or friends notice of certain suspect actions. These individuals can then act as extra sets of eyes and ears for the court to prevent or remedy abuse.

SECTION 311. NOTICE OF ORDER OF APPOINTMENT; RIGHTS.

(a) A guardian appointed under Section 309 shall give the adult subject to guardianship and all other persons given notice under Section 303 a copy of the order of appointment, together with notice of the right to request termination or modification. The order and notice must be given not later than 14 days after the appointment.

(b) Not later than 30 days after appointment of a guardian under Section 309, the court shall give to the adult subject to guardianship, the guardian, and any other person entitled to notice under Section 310(e) or a subsequent order a statement of the rights of the adult subject to guardianship and procedures to seek relief if the adult is denied those rights. The statement must be in at least 16-point font, in plain language, and, to the extent feasible, in a language in which the adult subject to guardianship is proficient. The statement must notify the adult subject to guardianship of the right to:

(1) seek termination or modification of the guardianship, or removal of the guardian, and choose an attorney to represent the adult in these matters;

(2) be involved in decisions affecting the adult, including decisions about the adult's care, dwelling, activities, or social interactions, to the extent reasonably feasible;

(3) be involved in health-care decision making to the extent reasonably feasible and supported in understanding the risks and benefits of health-care options to the extent

reasonably feasible;

(4) be notified at least 14 days before a change in the adult's primary dwelling or permanent move to a nursing home, mental-health facility, or other facility that places restrictions on the individual's ability to leave or have visitors unless the change or move is proposed in the guardian's plan under Section 316 or authorized by the court by specific order;

(5) object to a change or move described in paragraph (4) and the process for objecting;

(6) communicate, visit, or interact with others, including receiving visitors, and making or receiving telephone calls, personal mail, or electronic communications, including through social media, unless:

(A) the guardian has been authorized by the court by specific order to restrict communications, visits, or interactions;

(B) a protective order or protective arrangement instead of guardianship is in effect that limits contact between the adult and a person; or

(C) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological, or financial harm to the adult, and the restriction is:

(i) for a period of not more than seven business days if the person has a family or pre-existing social relationship with the adult; or

(ii) for a period of not more than 60 days if the person does not have a family or pre-existing social relationship with the adult;

(7) receive a copy of the guardian's plan under Section 316 and the guardian's report under Section 317; and

(8) object to the guardian's plan or report.

Comment

This section, which is new to the act, is designed to ensure that the guardian, the adult subject to guardianship, and family members and friends identified by the court understand the appointment and the most important rights of the adult subject to guardianship. The provisions help guardians to better understand their roles, thus reducing the risk of guardians acting inappropriately. They also increase transparency, help set reasonable expectations, and facilitate monitoring of the guardianship by the adult, to the extent he or she is able, and by the adult's family and friends.

Subsection (a) requires a guardian to give to the adult subject to guardianship and to all persons entitled to notice of the original petition, a copy of the order of appointment as well as notice of the right to request termination or modification of the guardianship. This notice must be given within 14 days after the appointment.

Subsection (b) requires the court not later than 30 days after the appointment to give notice of key rights to the adult subject to guardianship, to the guardian, and to other persons whom the court stated in its order of appointment were entitled to notice under Section 310(e). Providing notice of key rights is new to the act. It was added so that individuals subject to guardianship and their families are in a better position to act on their rights. Among the key rights are the right to seek termination or modification of the guardianship (Section 319); the right to petition for the guardian's removal (Section 318); the right to be involved in decision-making; the right to be notified of a change in the primary dwelling or permanent move to an institutional facility; and the right to communicate, visit, and interact with others (Section 315).

SECTION 312. EMERGENCY GUARDIAN FOR ADULT.

(a) On its own after a petition has been filed under Section 302, or on petition by a person interested in an adult's welfare, the court may appoint an emergency guardian for the adult if the court finds:

(1) appointment of an emergency guardian is likely to prevent substantial harm to the adult's physical health, safety, or welfare;

(2) no other person appears to have authority and willingness to act in the circumstances; and

(3) there is reason to believe that a basis for appointment of a guardian under Section 301exists.

(b) The duration of authority of an emergency guardian for an adult may not exceed [60] days, and the emergency guardian may exercise only the powers specified in the order of appointment. The emergency guardian's authority may be extended once for not more than [60 days] if the court finds that the conditions for appointment of an emergency guardian in subsection (a) continue.

(c) Immediately on filing of a petition for appointment of an emergency guardian for an adult, the court shall appoint an attorney to represent the respondent in the proceeding. Except as otherwise provided in subsection (d), reasonable notice of the date, time, and place of a hearing on the petition must be given to the respondent, the respondent's attorney, and any other person the court determines.

(d) The court may appoint an emergency guardian for an adult without notice to the adult and any attorney for the adult only if the court finds from an affidavit or testimony that the respondent's physical health, safety, or welfare will be substantially harmed before a hearing with notice on the appointment can be held. If the court appoints an emergency guardian without giving notice under subsection (c), the court must:

(1) give notice of the appointment not later than 48 hours after the appointment to:

(A) the respondent;

(B) the respondent's attorney; and

(C) any other person the court determines; and

(2) hold a hearing on the appropriateness of the appointment not later than [five] days after the appointment.

(e) Appointment of an emergency guardian under this section is not a determination that a basis exists for appointment of a guardian under Section 301.

(f) The court may remove an emergency guardian appointed under this section at any time. The emergency guardian shall make any report the court requires.

Comment

This section provides for the short-term appointment of an emergency guardian. The purpose of the section is to provide an expeditious means for the court to immediately protect an individual in urgent need of such protection.

Appointment of an emergency guardian is in order only when three conditions are met. First, the court must find that appointment of an emergency guardian is likely to prevent substantial harm to the respondent's health, safety or welfare. Second, there needs to be no one else willing and with authority to act to meet the adult's need. The effect of these first two requirements is that appointment of an emergency guardian is not proper where there is not an urgent need for such an appointment. Third, the court must have reason to believe that there is a basis to appoint a guardian under Section 301. Thus, an emergency guardian cannot be appointed for an individual where all indications are that the individual has the ability to receive and evaluate information, and make and communicate decisions. In such circumstances, the court would not have reason to believe that the basis for appointment under Section 301 exists.

Appointment of an emergency guardian represents a significant deprivation of liberty. As such, subsection (c) requires appointment of counsel for the respondent. Counsel for the respondent, consistent with the provisions of Section 305, should advocate for the respondent's wishes to the extent reasonably ascertainable. If counsel cannot reasonably ascertain those wishes, then counsel should advocate for a result that is least restrictive in type, duration, and scope, consistent with the respondent's interests. In some cases, this might mean advocating for a protective arrangement instead of guardianship under Article 5.

Emergency guardians may only be empowered to act for a limited time. Subsection (b) specifies a maximum duration of 60 days although this time limit is placed in brackets to signal that enacting jurisdictions are free to adjust the period. This 60-day limit is designed to protect the due process rights of the respondent, as this section allows appointment of an emergency guardian without the full process otherwise required.

Subsection (d) authorizes the appointment of an emergency guardian without notice to the respondent only under compelling circumstances. Appointment of an emergency guardian without notice to the respondent should be a very rare occurrence. An emergency guardian may only be appointed without prior notice when there is testimony that the respondent's physical health, safety, or welfare would be substantially harmed before the hearing on the appointment with notice could be held. In such case, notice must be given within 48 hours after the appointment. A hearing must then be held within five days after the appointment, or such number of days selected by the enacting state. States enacting this act should look at their requirements for an *ex parte* hearing and determine whether to adopt the time limit contained in this subsection or whether to impose different time limits. Five days appears to be the most common time period for a return hearing following an *ex parte* appointment. If the enacting

state uses a different time period for a hearing following an *ex parte* appointment of a guardian, the time period used should be relatively short.
Unless stated to the contrary in this section, other sections of this act applicable to guardians generally apply to an emergency guardian appointed under this section, including the provisions relating to the duties of guardians.

This section revises Section 312 of the 1997 act. A key difference from the 1997 act is that this act only permits appointment of an emergency guardian in situations in which the court has reason to believe that a basis exists for appointing a guardian under Section 301. However, the appointment of an emergency guardian under this section is not a determination that such a basis in fact exists.

SECTION 313. DUTIES OF GUARDIAN FOR ADULT.

(a) A guardian for an adult is a fiduciary. Except as otherwise limited by the court, a guardian for an adult shall make decisions regarding the support, care, education, health, and welfare of the adult subject to guardianship to the extent necessitated by the adult's limitations.

(b) A guardian for an adult shall promote the self-determination of the adult and, to the extent reasonably feasible, encourage the adult to participate in decisions, act on the adult's own behalf, and develop or regain the capacity to manage the adult's personal affairs. In furtherance of this duty, the guardian shall:

(1) become or remain personally acquainted with the adult and maintain sufficient contact with the adult, including through regular visitation, to know the adult's abilities, limitations, needs, opportunities, and physical and mental health;

(2) to the extent reasonably feasible, identify the values and preferences of the adult and involve the adult in decisions affecting the adult, including decisions about the adult's care, dwelling, activities, or social interactions; and

(3) make reasonable efforts to identify and facilitate supportive relationships and services for the adult.

(c) A guardian for an adult at all times shall exercise reasonable care, diligence, and

prudence when acting on behalf of or making decisions for the adult. In furtherance of this duty, the guardian shall:

(1) take reasonable care of the personal effects, pets, and service or support animals of the adult and bring a proceeding for a conservatorship or protective arrangement instead of conservatorship if necessary to protect the adult's property;

(2) expend funds and other property of the adult received by the guardian for the adult's current needs for support, care, education, health, and welfare;

(3) conserve any funds and other property of the adult not expended under paragraph (2) for the adult's future needs, but if a conservator has been appointed for the adult, pay the funds and other property at least quarterly to the conservator to be conserved for the adult's future needs; and

(4) monitor the quality of services, including long-term care services, provided to the adult.

(d) In making a decision for an adult subject to guardianship, the guardian shall make the decision the guardian reasonably believes the adult would make if the adult were able unless doing so would unreasonably harm or endanger the welfare or personal or financial interests of the adult. To determine the decision the adult subject to guardianship would make if able, the guardian shall consider the adult's previous or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the guardian.

(e) If a guardian for an adult cannot make a decision under subsection (d) because the guardian does not know and cannot reasonably determine the decision the adult probably would make if able, or the guardian reasonably believes the decision the adult would make would unreasonably harm or endanger the welfare or personal or financial interests of the adult, the

guardian shall act in accordance with the best interest of the adult. In determining the best interest of the adult, the guardian shall consider:

(1) information received from professionals and persons that demonstrate sufficient interest in the welfare of the adult;

(2) other information the guardian believes the adult would have considered if the adult were able to act; and

(3) other factors a reasonable person in the circumstances of the adult would consider, including consequences for others.

(f) A guardian for an adult immediately shall notify the court if the condition of the adult has changed so that the adult is capable of exercising rights previously removed.

Comment

Section 313 lays out the duties of a guardian for an adult. It is a major expansion and revision of Section 314 of the 1997 act. As a threshold matter, subsection (a) unequivocally states that the guardian is a fiduciary. This basic principle should guide the guardian throughout the course of his or her activities. Subsection (a) further emphasizes that regardless of the breadth of the guardian's appointment, the guardian may only exercise this authority to the extent necessitated by the adult's limitations. This limitation on exercise of the guardian's powers applies whether or not a limited guardian is formally appointed. In a limited guardianship, the court formally sets limits on what decisions the guardian can make. The guardian cannot make decisions outside those formal limitations. Subsection (a) makes clear that even though a full guardian may *potentially* exercise all powers, the guardian may *actually* exercise only powers that are consistent with the adult's limitations.

Subsection (b) outlines the guardian's basic duty to promote the adult's self-determination and to involve the adult in decision-making. The guardian is instructed to encourage the adult's participation in decisions and in developing or regaining capacity to act without a guardian. The adult's personal values and preferences, whether past or present, are to be considered when making decisions. Unlike Section 314(a) of the 1997 act, which required the guardian to consider the adult's values and preferences "to the extent known to the guardian," subsection (b) imposes a duty on the guardian to ascertain those preferences and values to the extent reasonably ascertainable.

Subsection (c) elaborates on the guardian's fiduciary duty by clearly stating the guardian must exercise reasonable care, diligence, and prudence in acting on behalf of the adult. It then provides a non-exclusive list of duties that flow from this standard of care.

Subsections (d) and (e) provide a clear decision-making standard for guardians for adults. Subsection (d) instructs the guardian to use what is frequently referred to as "substituted judgment"—that is, to make the decision the adult would make if able. The guardian, however, is authorized to deviate from using substituted judgment where doing so would unreasonably harm or endanger the welfare or interests of the adult.

Subsection (e) provides a decision-making standard for guardians who are unable to use the substituted judgment standard outlined in subsection (d). In such situations, the guardian is instructed to act in the adult's best interest and is given direction on what must be considered in order to determine the adult's best interest. The decision-making standards in subsections (d) and (e) are similar to National Guardianship Association Standard No. 7 and follow in broad outline the recommendations of the Third National Guardianship Summit. *See* David M. English, *Amending the Uniform Guardianship and Protective Proceedings Act to Implement the Standards and Recommendations of the Third National Guardianship Summit*, 12 NAELA J. 33, 41-43 (2016).

Finally, in furtherance of the concepts of limited guardianship and least restrictive alternatives, subsection (f) obligates the guardian to immediately notify the court when an adult becomes capable of exercising rights previously removed. The guardian is not to wait until the next reporting period.

Section 313 represents a substantial revision to the 1997 act's Section 314, which likewise described the duties of a guardian. The revised section is designed to more clearly spell out the guardian's duties and provide clear standards for making decisions in conjunction with or on behalf of the adult, thus reducing confusion for all involved. Notably, unlike Section 314 of the 1997 act, this section does not instruct the guardian to act in the adult's best interest. There was concern that this language could lead a guardian to act in an overly paternalistic manner. Specifically, it might lead the guardian to think that he or she must make the decision that is objectively "best" or "safest" for the individual even if that decision was not necessary to protect the adult from substantial harm and would not be consistent with what the adult would decide if able. Instead, the guardian is to use the substituted judgment standard unless substantial harm would result.

SECTION 314. POWERS OF GUARDIAN FOR ADULT.

(a) Except as limited by court order, a guardian for an adult may:

(1) apply for and receive funds and benefits for the support of the adult, unless a conservator is appointed for the adult and the application or receipt is within the powers of the conservator;

(2) unless inconsistent with a court order, establish the adult's place of dwelling;

(3) consent to health or other care, treatment, or service for the adult;

(4) if a conservator for the adult has not been appointed, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel another person to support the adult or pay funds for the adult's benefit;

(5) to the extent reasonable, delegate to the adult responsibility for a decision affecting the adult's well-being; and

(6) receive personally identifiable health-care information regarding the adult.

(b) The court by specific order may authorize a guardian for an adult to consent to the adoption of the adult.

[(c) The court by specific order may authorize a guardian for an adult to:

(1) consent or withhold consent to the marriage of the adult if the adult's right to marry has been removed under Section 310;

(2) petition for divorce, dissolution, or annulment of marriage of the adult or a declaration of invalidity of the adult's marriage; or

(3) support or oppose a petition for divorce, dissolution, or annulment of marriage of the adult or a declaration of invalidity of the adult's marriage.]

(d) In determining whether to authorize a power under subsection (b) [or (c)], the court shall consider whether the underlying act would be in accordance with the adult's preferences, values, and prior directions and whether the underlying act would be in the adult's best interest.

(e) In exercising a guardian's power under subsection (a)(2) to establish the adult's place of dwelling, the guardian shall:

(1) select a residential setting the guardian believes the adult would select if the adult were able, in accordance with the decision-making standard in Section 313(d) and (e). If

the guardian does not know and cannot reasonably determine what setting the adult subject to guardianship probably would choose if able, or the guardian reasonably believes the decision the adult would make would unreasonably harm or endanger the welfare or personal or financial interests of the adult, the guardian shall choose in accordance with Section 313(e) a residential setting that is consistent with the adult's best interest;

(2) in selecting among residential settings, give priority to a residential setting in a location that will allow the adult to interact with persons important to the adult and meet the adult's needs in the least restrictive manner reasonably feasible unless to do so would be inconsistent with the decision-making standard in Section 313(d) and (e);

(3) not later than 30 days after a change in the dwelling of the adult:

(A) give notice of the change to the court, the adult, and any person identified as entitled to the notice in the court order appointing the guardian or a subsequent order; and

(B) include in the notice the address and nature of the new dwelling and state whether the adult received advance notice of the change and whether the adult objected to the change;

(4) establish or move the permanent place of dwelling of the adult to a nursing home, mental-health facility, or other facility that places restrictions on the adult's ability to leave or have visitors only if:

(A) the establishment or move is in the guardian's plan under Section 316;

(B) the court authorizes the establishment or move; or

(C) the guardian gives notice of the establishment or move at least 14 days before the establishment or move to the adult and all persons entitled to notice under Section

310(e)(2) or a subsequent order, and no objection is filed;

(5) establish or move the place of dwelling of the adult outside this state only if consistent with the guardian's plan and authorized by the court by specific order; and

(6) take action that would result in the sale of or surrender of the lease to the primary dwelling of the adult only if:

(A) the action is specifically included in the guardian's plan under Section 316;

(B) the court authorizes the action by specific order; or

(C) notice of the action was given at least 14 days before the action to the adult and all persons entitled to the notice under Section 310(e)(2) or a subsequent order and no objection has been filed.

(f) In exercising a guardian's power under subsection (a)(3) to make health-care decisions, the guardian shall:

(1) involve the adult in decision making to the extent reasonably feasible, including, when practicable, by encouraging and supporting the adult in understanding the risks and benefits of health-care options;

(2) defer to a decision by an agent under a [power of attorney for health care] executed by the adult and cooperate to the extent feasible with the agent making the decision; and

(3) take into account:

(A) the risks and benefits of treatment options; and

(B) the current and previous wishes and values of the adult, if known or reasonably ascertainable by the guardian.

***Legislative Note**: Subsection (c) is bracketed because states have different policies with respect to a guardian's authority as to marriage and divorce.*

Comment

This section is a substantial expansion and revision of Section 315 of the 1997 act.

Subsection (a) lists default powers that all guardians have unless those powers are limited or otherwise inconsistent with the underlying court order. Thus, a guardian who is appointed under a limited guardianship order may only have a subset of the powers in subsection (a). These powers include the authority to apply for and receive benefits for the adult, including government benefits, unless doing so would usurp the powers of a conservator appointed for the adult.

Subsection (a) is similar to Section 315(a) of the 1997 act although subsection (a) of this act clarifies that a guardian has authority to receive personally identifiable health-care information regarding the adult. The remaining subsections of this section are a substantial expansion of the previous version.

Subsections (b) and (c) list powers that guardians have only if the court entered an order specifically granting the power. The court must clearly name the particular power and grant it to the guardian. Thus, a guardian would not have any of the powers under these subsections if a court order simply granted the guardian "all powers available under state law." The powers in these subsections are sometimes referred to as "hot powers" and implicate some of the most fundamental and politically sensitive rights of adults.

The powers in subsection (c) are placed in brackets in recognition of the split in opinion as to whether guardians should ever have such powers. For example, jurisdictions are split on whether a guardian has power to initiate a divorce for an adult. *See* Matthew Branson, *Guardian-Initiated Divorces: A Survey*, 29 J. AM. ACAD. MATRIM. L. 171 (2016) (surveying case law on the subject); Bella Feinstein, *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian-Initiated Divorces*, 10 NAELA J. 203 (2014) (discussing statutory approaches). Jurisdictions that do not allow the guardian to initiate a divorce generally base that policy on the very personal nature of marriage. Jurisdictions that allow the guardian to initiate a divorce have cited, among other reasons, the potential need to protect the adult from an abusive spouse. *See, e.g.,* Karbin v. Karbin, 977 N.E.2d 154 (Ill. 2012). Enacting states that have not yet addressed this issue should decide whether to give the guardian this power. Statutes dealing with the dissolution of marriage should be reviewed to determine whether this issue is already addressed.

Subsection (d) provides guidance to courts considering whether to grant guardians the hot powers listed in subsections (b) and (c). Courts are to consider whether such grants would be consistent with the adult's preferences, values, directions, and best interests.

Subsection (e) provides the guardian with substantial direction as to how to exercise the power to establish the adult's place of dwelling. This subsection recognizes that the decision where to live is among the most consequential decisions in an adult's life. An adult's dwelling impacts quality

of life, availability of important services, and connectivity to family and friends. As such, the decision of where the adult will live is critical. As a general matter, subsection (e) instructs guardians to use a decision-making approach consistent with the guardian's general duties under Section 313(d) and (e). In addition, the guardian is instructed to give priority to living situations located in a place that will allow the adult to continue important social relationships, and that meet the adult's needs without unnecessary restrictions.

In order to keep better track of where the individual subject to guardianship is located, to ensure that the individual's residential placement is appropriate, and to ensure the adult has a voice in the process where feasible, subsection (e)(3) requires the guardian to provide notice of a change in dwelling within 30 days after the change to the court, the adult, and other persons the court ordered were entitled to such notice when appointing the guardian. In addition, pursuant to subsection (e)(4), the guardian may permanently place the adult in certain particularly restrictive settings (e.g., a nursing home) only if the move was in the guardian's plan (Section 316), specifically authorized by the court, or the adult and other persons so entitled received advance notice. Similar process is required under subsection (e)(6) before the guardian may take any action that would result in the sale of or surrender of the lease to the adult's primary dwelling. In addition, if the move is to a location outside of the state, mere prior notice is insufficient. Rather, subsection (e)(5) requires that all moves outside of the state be expressly authorized by the court and set forth in the guardian's plan. This limitation helps not only to protect the adult but discourages forum shopping. Subsection (e) is based in substantial part on Third National Guardianship Summit Standard 6.1 et seq. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1197-98 (2012).

Subsection (f) provides the guardian with substantial direction as to how to exercise the power to make health-care decisions on behalf of the adult, and draws from Third National Guardianship Summit Standard 5.1 et seq. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1196-98 (2012). As health-care decisions are among the most intimate of all decisions, the guardian is required to involve the adult to the extent reasonably feasible, and is reminded that doing so may require helping the adult to understand risks and benefits associated with different options. As a threshold matter, a guardian must also ascertain whether a power of attorney for health care is in effect. If there is a valid power of attorney for health care, the decision of the health-care agent takes precedence over that of the guardian, absent a court order to the contrary. Further, the guardian may not revoke a health-care power of attorney except by court order. If the individual has not appointed a health-care agent, the guardian may proceed to make a health-care decision. In making a decision, the guardian must ascertain and take into account the adult's current and previous wishes and values, whether written or oral. Like all decisions by a guardian, in making health-care decisions, the guardian must follow the general decision-making standards in Section 313(d)-(e). Also, Section 315(b) limits a guardian's ability to commit the individual subject to guardianship to a mental-health institution. There may be similar restrictions under other law governing a guardian's power to consent to electroconvulsive therapy (ECT) or other shock treatment, experimental treatment, sterilization, forced medication with psychotropic drugs, or abortion.

SECTION 315. SPECIAL LIMITATIONS ON GUARDIAN'S POWER.

(a) Unless authorized by the court by specific order, a guardian for an adult does not have the power to revoke or amend a [power of attorney for health care] or power of attorney for finances executed by the adult. If a [power of attorney for health care] is in effect, unless there is a court order to the contrary, a health-care decision of an agent takes precedence over that of the guardian and the guardian shall cooperate with the agent to the extent feasible. If a power of attorney for finances is in effect, unless there is a court order to the contrary, a decision by the agent which the agent is authorized to make under the power of attorney for finances takes precedence over that of the guardian and the guardian shall cooperate with the agent to the extent feasible.

(b) A guardian for an adult may not initiate the commitment of the adult to a [mental health] facility except in accordance with the state's procedure for involuntary civil commitment.

(c) A guardian for an adult may not restrict the ability of the adult to communicate, visit, or interact with others, including receiving visitors and making or receiving telephone calls, personal mail, or electronic communications, including through social media, or participating in social activities, unless:

(1) authorized by the court by specific order;

(2) a protective order or a protective arrangement instead of guardianship is in effect that limits contact between the adult and a person; or

(3) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological, or financial harm to the adult and the restriction is:

(A) for a period of not more than seven business days if the person has a

family or pre-existing social relationship with the adult; or

(B) for a period of not more than 60 days if the person does not have a family or pre-existing social relationship with the adult.

Comment

Section 315 address three important limitations on a guardian's powers: (1) limitations related to advance-planning documents in existence at the time of the guardian's appointment, (2) limitations related to commitment of the adult to a mental health facility, and (3) limitations on the guardian's ability to restrict the adult's interactions with others. The provisions relating to the adult's interactions are new to the act. The other provisions of this section are found in Section 316 of the 1997 act although the provisions relating to advanced-planning documents have been revised.

Subsection (a) provides that if the adult subject to guardianship has executed a power of attorney for health care or finances, the guardian cannot revoke it without a court order. Further, the agent's decision takes priority over that of the guardian unless the power of attorney has been revoked, and the guardian has a duty to cooperate with the agent to the extent feasible. Requiring deference to the agent appointed by the adult subject to guardianship helps ensure that the adult's wishes are respected. In addition, it discourages petitioners from seeking a guardianship for the sole purpose of displacing an agent who is acting in a manner consistent with the agent's fiduciary duties. Subsection (a) is an expansion of Section 316(c) of the 1997 act. Under the 1997 act, the guardian did not have authority to revoke a power of attorney for finances even with court approval. That power was reserved to the conservator. *See* Section 411(d) of the 1997 act.

Subsection (b) precludes commitment of an adult subject to guardianship to a mental health facility without following the state's procedures for civil commitment. Although a guardian may not commit an adult to a mental health facility, the guardian may initiate proceedings in accordance with the state's applicable mental health care statutes for civil commitment, outpatient treatment, or involuntary medication for mental health treatment. Subsection (b) is identical to Section 316(d) of the 1997 act.

Subsection (c), which is new, limits the ability of the guardian to restrict the adult's interactions with others. The guardian is only empowered to restrict the adult's ability to communicate, visit, or interact with others for an extended period of time if required by a separate court order or specifically authorized by the court. Thus, for example, a court order granting the guardian "all powers available under state law" would not authorize such a restriction. Rather, the guardian should be considered to be so empowered only if the court has expressly authorized restricting interaction with a particular person or a very specific category of persons. The section includes a non-exhaustive list of types of interactions to which it applies—including in-person visits, telephone conversations, personal mail, and social media use.

Subsection (c)(3) permits a short-term restriction on the adult's right to interact with others where the guardian has good cause to believe the restriction is necessary because a specific person poses significant risk of harm to the adult. The restriction may not last more than seven business days if the adult has a familial or pre-existing social relationship with the other person, and otherwise may not last more than 60 days. For longer restrictions, the guardian would need to petition the court under this section for express authorization.

Subsection (c)(3) responds to growing concerns about guardians improperly isolating adults subject to guardianship and estranging them from family members or friends who are important to them. It recognizes that adults subject to guardianship have a right to interactions with family and friends, and severely limits the circumstances under which this important right may be curtailed. While the act is sensitive to the interests of family members and friends, it situates the right to choose whether or not to interact with the adult subject to guardianship, not with the would-be visitor. Locating the right with a visitor, by contrast, would be an affront to the rights of the adult subject to guardianship as it would limit the adult's ability to make choices for himself or herself as to with whom to interact.

SECTION 316. GUARDIAN'S PLAN.

(a) A guardian for an adult, not later than 60 days after appointment and when there is a significant change in circumstances, or the guardian seeks to deviate significantly from the guardian's plan, shall file with the court a plan for the care of the adult. The plan must be based on the needs of the adult and take into account the best interest of the adult as well as the adult's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the guardian. The guardian shall include in the plan:

(1) the living arrangement, services, and supports the guardian expects to arrange, facilitate, or continue for the adult;

(2) social and educational activities the guardian expects to facilitate on behalf of the adult;

(3) any person with whom the adult has a close personal relationship or relationship involving regular visitation and any plan the guardian has for facilitating visits with the person;

(4) the anticipated nature and frequency of the guardian's visits and

communication with the adult;

(5) goals for the adult, including any goal related to the restoration of the adult's rights, and how the guardian anticipates achieving the goals;

(6) whether the adult has an existing plan and, if so, whether the guardian's plan is consistent with the adult's plan; and

(7) a statement or list of the amount the guardian proposes to charge for each service the guardian anticipates providing to the adult.

(b) A guardian shall give notice of the filing of the guardian's plan under subsection (a), together with a copy of the plan, to the adult subject to guardianship, a person entitled to notice under Section 310(e) or a subsequent order, and any other person the court determines. The notice must include a statement of the right to object to the plan and be given not later than 14 days after the filing.

(c) An adult subject to guardianship and any person entitled under subsection (b) to receive notice and a copy of the guardian's plan may object to the plan.

(d) The court shall review the guardian's plan filed under subsection (a) and determine whether to approve the plan or require a new plan. In deciding whether to approve the plan, the court shall consider an objection under subsection (c) and whether the plan is consistent with the guardian's duties and powers under Sections 313 and 314. The court may not approve the plan until [30] days after its filing.

(e) After the guardian's plan filed under this section is approved by the court, the guardian shall provide a copy of the plan to the adult subject to guardianship, a person entitled to notice under Section 310(e) or a subsequent order, and any other person the court determines.

Comment

Section 316, which is new to the act, requires a guardian to create an individualized plan for the adult subject to guardianship. The requirement that the guardian file a plan is consistent with National Probate Court Standard 3.3.16 (2013), and with Third Summit Guardianship Summit Recommendation 1.1. The plan serves as a tool for the guardian to identify the adult's needs and desires, and as a guide for the guardian to meet those needs and respect those desires consistent with the guardian's duties and powers. The planning process creates an opportunity for guardians to consider and develop an approach to their role that is transparent and consistent with the requirements of this act. The existence of the plan also allows for more meaningful monitoring of guardians as the court and others can hold a guardian accountable for compliance with the plan.

In addition, the guardian's plan plays an important role in avoiding subsequent problems. It alerts the court, the adult, and others entitled to a copy of the plan of the guardian's plans. This allows the court, adult, and such other persons to identify potential problems before they occur. From the guardian's perspective, this can be advantageous as well, creating a mechanism to alert the guardian to objections in advance of action, at a time when the guardian can still change course. Thus, the filing of the plan may assist the guardian in avoiding future conflicts and other problems.

The inclusion of Section 316 is consistent with the standards adopted by the Third National Guardianship Summit. In particular, it aligns with Standard 1.1, which calls on each guardian to "develop and implement a plan setting forth short-term and long-term goals for meeting the needs of the person" and explains that such plans must "emphasize a 'person-centered philosophy.'" *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1192 (2012). The inclusion thus represents an advance over the 1997 act, which did not require guardianship plans although Section 418 of the earlier act did require that conservators file plans.

Subsection (a) establishes when the guardian must file a plan with the court. A new or revised plan is required not later than 60 days after the guardian is appointed, anytime there is a significant change in the adult's circumstances, and anytime the guardian seeks to deviate from the guardian's previously filed plan. Thus, for example, a new plan is in order when the adult loses or regains significant abilities, important supporters leave or enter the adult's life, or the guardian determines what was previously planned is no longer appropriate.

Subsection (a) further provides for the plan to be a person-centered plan, and lists the topics it must cover. The plan must be based on the adult's needs and best interests, as well as the adult's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the guardian. In crafting a plan, guardians should strive to produce a plan that is not only person-centered and reflects a robust understanding of the resources potentially available to the adult, but also one that is clear, organized, and detailed.

Under subsection (a)(7), one topic that must be addressed in the plan is the amount of any fees the guardian proposes to charge for each anticipated service. While earlier disclosure of the

proposed fees is not required, best practice will typically be to disclose fees even before crafting the plan. It is helpful, for example, for the court to have a sense of the likely fees in determining whether or not to make the appointment.

Subsection (b) requires the guardian to provide a copy of the plan and notice of its filing to the adult subject to guardianship, to persons entitled to notice under the terms of the order appointing the guardian, and to anyone else the court has determined is entitled to notice, including persons entitled to notice under Section 310(e). The notice must be given no later than 14 days after the filing of the plan and must explain that the person receiving the notice has a right to object to the plan, as established in subsection (c).

Subsection (d) requires the court to review the guardian's plan, whether it be a new plan or a revision, and to determine whether or not to approve it. In order to ensure that those receiving copies of the plan have sufficient time to object to it, the court may not approve the plan until 30 days after it was filed. The court is not required to approve the plan but implementing a system for monitoring the plan, similar to the system required by Section 317(e) for monitoring the annual report, will help make certain that the guardian is properly discharging the guardian's duties. The court may decide to approve the plan or direct the guardian to revise the plan. Section 317(c) authorizes a court to appoint a visitor to review not only a report filed under that section but also a plan filed under this section. A court should not approve a plan if it is inconsistent with the guardian's duties or powers, or without seriously considering any objections made to it.

Finally, subsection (e) requires the guardian to provide any plan approved by the court to the adult subject to guardianship, to persons entitled to notice under the terms of the order appointing the guardian, and to anyone else the court has determined is entitled to notice.

SECTION 317. GUARDIAN'S REPORT; MONITORING OF GUARDIANSHIP.

(a) A guardian for an adult, not later than 60 days after appointment and at least annually thereafter, shall file with the court a report in a record regarding the condition of the adult and accounting for funds and other property in the guardian's possession or subject to the guardian's control.

(b) A report under subsection (a) must state or contain:

(1) the mental, physical, and social condition of the adult;

(2) the living arrangements of the adult during the reporting period;

(3) a summary of the supported decision making, technological assistance, medical services, educational and vocational services, and other supports and services provided

to the adult and the guardian's opinion as to the adequacy of the adult's care;

(4) a summary of the guardian's visits with the adult, including the dates of the visits;

(5) action taken on behalf of the adult;

(6) the extent to which the adult has participated in decision making;

(7) if the adult is living in a [mental health] facility or living in a facility that provides the adult with health-care or other personal services, whether the guardian considers the facility's current plan for support, care, treatment, or habilitation consistent with the adult's preferences, values, prior directions, and best interest;

(8) anything of more than de minimis value which the guardian, any individual who resides with the guardian, or the spouse, [domestic partner,] parent, child, or sibling of the guardian has received from an individual providing goods or services to the adult;

(9) if the guardian delegated a power to an agent, the power delegated and the reason for the delegation;

(10) any business relation the guardian has with a person the guardian has paid or that has benefited from the property of the adult;

(11) a copy of the guardian's most recently approved plan under Section 316 and a statement whether the guardian has deviated from the plan and, if so, how the guardian has deviated and why;

(12) plans for future care and support of the adult;

(13) a recommendation as to the need for continued guardianship and any recommended change in the scope of the guardianship; and

(14) whether any co-guardian or successor guardian appointed to serve when a

designated event occurs is alive and able to serve.

(c) The court may appoint a [visitor] to review a report submitted under this section or a guardian's plan submitted under Section 316, interview the guardian or adult subject to guardianship, or investigate any other matter involving the guardianship.

(d) Notice of the filing under this section of a guardian's report, together with a copy of the report, must be given to the adult subject to guardianship, a person entitled to notice under Section 310(e) or a subsequent order, and any other person the court determines. The notice and report must be given not later than 14 days after the filing.

(e) The court shall establish procedures for monitoring a report submitted under this section and review each report at least annually to determine whether:

(1) the report provides sufficient information to establish the guardian has complied with the guardian's duties;

(2) the guardianship should continue; and

(3) the guardian's requested fees, if any, should be approved.

(f) If the court determines there is reason to believe a guardian for an adult has not complied with the guardian's duties or the guardianship should be modified or terminated, the court:

(1) shall notify the adult, the guardian, and any other person entitled to notice under Section 310(e) or a subsequent order;

(2) may require additional information from the guardian;

(3) may appoint a [visitor] to interview the adult or guardian or investigate any matter involving the guardianship; and

(4) consistent with Sections 318 and 319, may hold a hearing to consider removal

of the guardian, termination of the guardianship, or a change in the powers granted to the guardian or terms of the guardianship.

(g) If the court has reason to believe fees requested by a guardian for an adult are not reasonable, the court shall hold a hearing to determine whether to adjust the requested fees.

(h) A guardian for an adult may petition the court for approval of a report filed under this section. The court after review may approve the report. If the court approves the report, there is a rebuttable presumption the report is accurate as to a matter adequately disclosed in the report.

Legislative Note: *The term "visitor" is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.*

Comment

This section is an expansion of Section 317 of the 1997 act. This section requires that a guardian regularly file a report detailing the care and needs of the adult, describing the guardian's actions since the last report, and accounting for funds or other property under the guardian's control. As set forth in subsection (a), the first report must be filed within 60 days of the guardian's appointment. A new report is required at least annually. Subsection (a) gives the guardian 30 more days to file a report than did Section 317 of the 1997 act. This extension of time reflects the fact that the guardian is now also required to create a person-centered plan for the adult, and this extension gives the guardian the time to do so in a considered manner.

Subsection (b) describes the required contents of the report. The list has been expanded from that in Section 317(a) of the 1997 act to provide the court with more comprehensive and useful information about the needs of the adult subject to guardianship and the guardian's performance. Key changes include required reporting on support and assistance provided by the guardian to the adult; a requirement that the guardian report on whether care in an institution is consistent with the adult's preferences, values, and directions (not just the adult's best interest); and a requirement that the guardian include information related to delegation of duties, deviations from the guardian's plan, and potential conflicts of interest. Similar to Section (a)(6)-(7) of the 1997 act, subsections (b)(12)-(13) emphasize the importance of limited guardianship by requiring the guardian to report information relevant to determining whether the guardianship should be modified or terminated. Compliance with subsection (b)(13) should not be read as relieving the guardian of the duty under Section 313(f) to immediately notify the court that the adult's condition has changed such that the adult is capable of exercising rights previously removed.

The guardian should provide supporting documentation to assist the court's review of the report where practicable. For example, to support the guardian's description of the adult's mental, physical and social condition, it may be helpful to provide a copy of the adult's current treatment plan.

Subsection (c) authorizes the court to appoint a visitor to review a report submitted under this section or the guardian's plan, interview the guardian or the adult, and investigate any other matter involving the guardianship. The visitor can provide the court with additional information and context to understand the guardian's report and potential omissions in that report. The appointment of a visitor can form a vital part of the monitoring procedures required under subsection (e).

Subsection (d) requires the report, and notice of its filing, be given in a timely manner to the adult subject to guardianship, any person entitled to such notice of the report by the terms of the original order appointing the guardian or a subsequent court order, and any other person the court determines. It thus works in tandem with Section 310(e) to increase the ability of interested individuals to monitor guardianships at minimal cost to the public. As explained in the comments to Section 310, such persons can act as extra sets of eyes and ears for the court to prevent or remedy abuse.

Subsection (e) requires the court to establish procedures for monitoring guardians' reports. Under this subsection, the court is required to review such reports at least annually to determine whether the guardian has complied with the guardian's duties, whether the guardianship should continue, and whether any fees requested by the guardian should be approved. In performing this review, the court should carefully consider not only the report, but the supporting documentation and the adequacy of such supporting documentation. The establishment of a monitoring system was also required by Section 317(c) of the 1997 act although that provision lacked the depth of subsection (e) of this act.

An independent monitoring system is crucial for a court to adequately safeguard against abuses in guardianship cases. Monitors can be paid court personnel, court appointees, or volunteers. Subsection (e) does not specify the procedures the court must use. The key is to develop an independent monitoring system that can not only safeguard against obvious abuse and neglect, but also hold guardians accountable for their fiduciary duties. For guidance, courts are directed to National Probate Court Standards 3.3.17 (2013). Monitoring systems are also discussed in the National Association of Court Management Adult Guardianship Guide (2014), and the handbook, Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community, which was published by the American Bar Association Commission on Law and Aging in 2011.

Subsection (f) sets forth the next steps for courts that determine there is reason to believe the guardian has not complied with the duties imposed by this act, or that the guardianship should be modified or terminated. The court is required to act in response to this finding, but is given significant discretion in how to proceed. In some cases, the best practice will be to move directly to holding a hearing. In others, the court may simply request additional information or appoint a visitor. Regardless of which approach it takes, however, the court must notify the adult subject to guardianship, the guardian, and any other person entitled to notice under Section 310(e) of the court's action or proposed action.

Subsection (g) requires a court with reason to believe the guardian's fees are unreasonable to

hold a hearing to determine whether to adjust those fees. In considering the reasonableness of proposed fees, the court should consult Section 120 of this act, which lists factors the court is to consider in setting the guardian's compensation.

Finally, subsection (h) permits a guardian for an adult to petition the court to approve a report filed under this section. A court must review the report before approval. If the court approves the report following a review, it creates a rebuttable presumption that the report is accurate as to any matter that was adequately disclosed.

SECTION 318. REMOVAL OF GUARDIAN FOR ADULT; APPOINTMENT OF SUCCESSOR.

(a) The court may remove a guardian for an adult for failure to perform the guardian's duties or for other good cause and appoint a successor guardian to assume the duties of guardian.

(b) The court shall hold a hearing to determine whether to remove a guardian for an adult and appoint a successor guardian on:

(1) petition of the adult, guardian, or person interested in the welfare of the adult, which contains allegations that, if true, would support a reasonable belief that removal of the guardian and appointment of a successor guardian may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed during the preceding six months;

(2) communication from the adult, guardian, or person interested in the welfare of the adult which supports a reasonable belief that removal of the guardian and appointment of a successor guardian may be appropriate; or

(3) determination by the court that a hearing would be in the best interest of the adult.

(c) Notice of a petition under subsection (b)(1) must be given to the adult subject to guardianship, the guardian, and any other person the court determines.

(d) An adult subject to guardianship who seeks to remove the guardian and have a

successor guardian appointed has the right to choose an attorney to represent the adult in this matter. [If the adult is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 305.] The court shall award reasonable attorney's fees to the attorney for the adult as provided in Section 119.

(e) In selecting a successor guardian for an adult, the court shall follow the priorities under Section 309.

(f) Not later than 30 days after appointing a successor guardian, the court shall give notice of the appointment to the adult subject to guardianship and any person entitled to notice under Section 310(e) or a subsequent order.

Legislative Note: *A state may make the policy decision to include the bracketed language in subsection (d). This policy decision parallels Alternative A in Section 305.*

Comment

This section is based in part on Section 112 of the 1997 act, which covered both termination of guardianship or conservatorship as well as changes in a guardian's or conservator's appointment. This act, by comparison, divides the issue of removal of an appointee (which focuses on the appointee's abilities and actions), which is addressed here, from the issue of termination or modification of an appointment (which focuses on the needs, abilities, and limitations of the individual subject to the appointment), which is addressed in Section 319. The section mirrors Section 430, which governs removal of a conservator and appointment of a successor conservator.

Subsection (a) empowers the court to remove a guardian for failure to perform duties or for other good cause. Removal for failure to perform duties includes situations in which the guardian is not performing the guardian's duties either because the guardian is failing to act or because the guardian is otherwise acting in a manner inconsistent with the requirements of this act. Good cause may exist even if the guardian is not at fault. Similar to Section 706(b) of the Uniform Trust Code, which includes a request by the qualified beneficiaries as one factor the court may consider in deciding whether to remove a trustee, a guardianship court may similarly consider a request of the individual under guardianship as a factor in deciding whether good cause exists to remove a guardian. In determining whether to remove the guardian, every effort should be made to determine the wishes of the individual subject to guardianship with regard to the proposed removal. Courts seeking examples of good cause for removal may wish to consult their state's law on removal of a trustee. *See generally* Uniform Trust Code §706 and comment; Restatement (Third) of Trusts §37 (2003).

Section 112(b) of the 1997 act authorized the court to remove a guardian if removal was in the best interest of the individual subject to guardianship or for other good cause. In light of this act's emphasis on substituted judgment as the standard for a guardian's decisions, subsection (a) removes "best interest" as an independent basis for removal. The drafting committee concluded that the reference to "best interest" might unnecessarily restrict the court's ability to apply the more flexible "good cause" standard.

Subsection (b)(1) authorizes a petition for removal of the guardian to be filed by the adult subject to guardianship, the guardian, or any person interested in the adult's welfare. Thus, the fact that the adult is subject to guardianship in no way limits the adult's right to seek removal.

Subsection (b) requires the court to hold a hearing on whether the guardian should be removed under three specified circumstances: (1) if the court determines a hearing would be in the best interest of the adult subject to guardianship; (2) if the adult, guardian, or another person interested in the welfare of the adult petitions for removal and the petition contains allegations that—if true—would support a reasonable belief that removal is in order; and (3) if the court receives a communication from any such person that supports a reasonable belief that removal may be appropriate. The form that the communication takes is not determinative, and could include a grievance filed under Section 127. The fact that the court has reason to believe that the allegations are not true is not a sufficient reason to refuse to hold a hearing. It is important that the court hear the evidence as to whether removal is appropriate, and not reach conclusions without a considered process. To avoid excessive drain on judicial resources, however, the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months.

Subsection (c) requires that notice of a petition to remove the guardian that is filed by the adult, guardian, or person interested in the adult's welfare under subsection (b)(1) must be given to the adult, the guardian, and any other person the court determines. Subsection (c) does not expressly require that notice be given if a hearing is held pursuant to an informal communication under subsection (b)(2) or independent determination by the court under subsection (b)(3), but it would appear that the notice given would as a practical matter be the same. For a hearing on the guardian's removal, notice should always be given to the individual under guardianship and to the guardian, and the court always has authority to order notice to other persons.

Subsection (d) provides the adult subject to guardianship seeking to have the guardian removed with the right to choose an attorney to represent him or her in the matter. Such representation is essential to protecting the adult's due process rights. To ensure the availability of such representation, the court is required to award reasonable attorney fees to such an attorney in accordance with Section 119 of this act. Subsection (d) includes bracketed language that an enacting jurisdiction may adapt to indicate its preferences on when to require a court to appoint an attorney for the adult.

If the court removes a guardian, the court must then appoint a successor guardian. This is because removal simply ends the particular appointment, it does not terminate the guardianship or modify other terms of the guardianship. Subsection (e) instructs the court to use the same priorities it uses in appointing a guardian in the first place when appointing a successor guardian.

Subsection (f) requires timely notice of the appointment of the successor guardian to the adult, and other persons entitled to such notice.

SECTION 319. TERMINATION OR MODIFICATION OF GUARDIANSHIP FOR ADULT.

(a) An adult subject to guardianship, the guardian for the adult, or a person interested in the welfare of the adult may petition for:

(1) termination of the guardianship on the ground that a basis for appointment under Section 301 does not exist or termination would be in the best interest of the adult or for other good cause; or

(2) modification of the guardianship on the ground that the extent of protection or assistance granted is not appropriate or for other good cause.

(b) The court shall hold a hearing to determine whether termination or modification of a guardianship for an adult is appropriate on:

(1) petition under subsection (a) which contains allegations that, if true, would support a reasonable belief that termination or modification of the guardianship may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed during the preceding six months;

(2) communication from the adult, guardian, or person interested in the welfare of the adult which supports a reasonable belief that termination or modification of the guardianship may be appropriate, including because the functional needs of the adult or supports or services available to the adult have changed;

(3) a report from a guardian or conservator which indicates that termination or modification may be appropriate because the functional needs of the adult or supports or services

available to the adult have changed or a protective arrangement instead of guardianship or other less restrictive alternative for meeting the adult's needs is available; or

(4) a determination by the court that a hearing would be in the best interest of the adult.

(c) Notice of a petition under subsection (b)(1) must be given to the adult subject to guardianship, the guardian, and any other person the court determines.

(d) On presentation of prima facie evidence for termination of a guardianship for an adult, the court shall order termination unless it is proven that a basis for appointment of a guardian under Section 301 exists.

(e) The court shall modify the powers granted to a guardian for an adult if the powers are excessive or inadequate due to a change in the abilities or limitations of the adult, the adult's supports, or other circumstances.

(f) Unless the court otherwise orders for good cause, before terminating or modifying a guardianship for an adult, the court shall follow the same procedures to safeguard the rights of the adult which apply to a petition for guardianship.

(g) An adult subject to guardianship who seeks to terminate or modify the terms of the guardianship has the right to choose an attorney to represent the adult in the matter. [If the adult is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 305.] The court shall award reasonable attorney's fees to the attorney for the adult as provided in Section 119.

Legislative Note: *A state may make the policy decision to include the bracketed language in subsection (g). This policy decision parallels Alternative A in Section 305.*

Comment

Section 319 governs termination and modification of a guardianship. This topic was addressed

in Section 112 of the 1997 act, which also covered changes in the guardian's appointment, which is now addressed in Section 318.

Termination occurs when the guardianship and the authority of the guardian is terminated and all powers granted to the guardian are restored to the individual who was formerly subject to guardianship. Termination also occurs upon the individual's death. Modification occurs when the court changes the powers granted to the guardian under a continuing guardianship. Modification can expand or contract the guardian's powers.

Subsection (a) provides that the adult subject to guardianship, the guardian, or any person interested in the adult's welfare may petition for termination or modification of the guardianship. Thus, the fact that the adult is subject to guardianship in no way limits the adult's right to seek court review.

Pursuant to subsection (b), the court must hold a hearing to determine whether termination or modification is appropriate under four circumstances: (1) if the court concludes that such a hearing would be in the best interest of the adult subject to guardianship; (2) if a report from either a guardian or conservator indicated that termination or modification may be appropriate because the needs of the adult have changed or a less restrictive alternative may be available; (3) if the adult, guardian, or another person interested in the welfare of the adult petitions for termination or removal and the petition contains allegations that—if true—would support a reasonable belief that termination or modification is in order; and (4) if the court receives a communication from the adult, guardian, or person interested in the adult's welfare that supports a reasonable belief that termination or modification may be appropriate. The form that the communication takes is not determinative, and could include a grievance filed under Section 127.

The fact that the court has reason to believe that the allegations are not true is not a sufficient reason to refuse to hold a hearing. It is important that the court hear the evidence as to whether modification or termination is appropriate, and not reach conclusions without a considered process. To avoid excessive drain on judicial resources, however, the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months. Permitting a communication that falls short of a petition to trigger reconsideration of the guardianship is necessary to make restoration a practical possibility for adults subject to guardianship. *See* Erica Wood, Pamela Teaster, and Jenica Cassidy, *Restoration of Rights in Adult Guardianship* (American Bar Association Commission on Law and Aging with the Virginia Tech Center for Gerontology, 2017) (reporting that "[t]he filing of a formal petition requesting restoration is burdensome or impossible for many individuals subject to guardianship").

Subsection (c) requires that notice of a petition to terminate or modify the guardianship that is filed by the adult, guardian, or person interested in the adult's welfare under subsection (b)(1) must be given to the adult, the guardian, and any other person the court determines. Subsection (c) does not expressly require that notice be given if a hearing is held pursuant to an informal communication under subsection (b)(2) or independent determination by the court under subsection (b)(3), but it would appear that the notice given would as a practical matter be the

same. For a hearing on the guardian's removal, notice should always be given to the individual under guardianship and to the guardian, and the court always has authority to order notice to other persons.

Subsection (d) requires a court to terminate a guardianship on presentation of prima facie evidence that supports termination unless it is proven that it would be proper to impose a guardianship if a petition for guardianship were brought at the current time. That is, if there is no basis for imposing a guardianship under Section 301, then the court may not continue the guardianship.

Subsection (e) requires the court to modify the guardian's powers if they are excessive or inadequate due to a change in the abilities or limitations of the adult, the adult's supports, or other circumstances. Thus, even if the adult's abilities have not improved, the court might be required to reduce the powers granted to the guardian if new, less restrictive alternatives become available (for example, the individual now has access to greater decision-making support, or technological assistance). Similarly, the court might be required to increase the powers granted the guardian if the adult's abilities have deteriorated creating an unmet need, and no less restrictive alternatives are available.

Subsection (f) requires that unless the court otherwise orders for good cause, before terminating or modifying a guardianship for an adult under this section, the court must follow the same procedures to safeguard the rights of the respondent as apply at a hearing on a petition for an original appointment. These procedures include appointment of a visitor and may also include appointment of counsel. This subsection is intended to ensure that the due process rights of the adult subject to guardianship are fully respected, and that the court is using a process that will provide the court with the evidence needed to make an appropriate and considered decision.

Finally, subsection (g) recognizes the right of an adult subject to guardianship who seeks to terminate or modify that guardianship to be represented by counsel. Such representation is essential to protect the individual's due process rights. To ensure the availability of such representation, the court is required to award reasonable attorney fees to such an attorney in accordance with Section 119 of this act. As noted in the comments to Section 119, such compensation is important to ensure access to counsel for those seeking to restore rights. *See* Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Ethics and Legality of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 603 (2016) ("having the right to directly challenge the continued necessity or terms of the guardianship, including who serves as guardian, is virtually meaningless without the accompanying right to legal representation."). Attorneys' concerns about payment for their services are a significant barrier to attorneys accepting representation of individuals subject to guardianship or conservatorship. *See* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L. J. 83, 102 (2015). Subsection (g) includes bracketed language that an enacting jurisdiction may adapt to indicate its preferences on when to require a court to appoint an attorney for the adult.

As a general matter, Section 319 is responsive to concerns that adults subject to guardianship have historically faced often insurmountable barriers to restoration of rights. *See generally* Erica Wood, Pamela Teaster, and Jenica Cassidy, *Restoration of Rights in Adult Guardianship*

(American Bar Association Commission on Law and Aging with the Virginia Tech Center for Gerontology, 2017). Section 319, together with other provisions in this act, is designed to reduce those barriers so that individuals' whose needs could be met by less restrictive means do not face unnecessary deprivations of liberty.

On the extent to which a guardian may be compensated for opposing a petition to modify or terminate the guardianship or remove the guardian, see Section 120(e).

[ARTICLE] 4

CONSERVATORSHIP

SECTION 401. BASIS FOR APPOINTMENT OF CONSERVATOR.

(a) On petition and after notice and hearing, the court may appoint a conservator for the property or financial affairs of a minor if the court finds by a preponderance of evidence that appointment of a conservator is in the minor's best interest, and:

(1) if the minor has a parent, the court gives weight to any recommendation of the parent whether an appointment is in the minor's best interest; and

(2) either:

(A) the minor owns funds or other property requiring management or protection that otherwise cannot be provided;

(B) the minor has or may have financial affairs that may be put at unreasonable risk or hindered because of the minor's age; or

(C) appointment is necessary or desirable to obtain or provide funds or other property needed for the support, care, education, health, or welfare of the minor.

(b) On petition and after notice and hearing, the court may appoint a conservator for the property or financial affairs of an adult if the court finds by clear-and-convincing evidence that:

(1) the adult is unable to manage property or financial affairs because:

(A) of a limitation in the adult's ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate supportive services,

technological assistance, or supported decision making; or

(B) the adult is missing, detained, or unable to return to the United States;

(2) appointment is necessary to:

(A) avoid harm to the adult or significant dissipation of the property of the adult; or

(B) obtain or provide funds or other property needed for the support, care, education, health, or welfare of the adult or of an individual entitled to the adult's support; and

(3) the respondent's identified needs cannot be met by a protective arrangement instead of conservatorship or other less restrictive alternative.

(c) The court shall grant a conservator only those powers necessitated by demonstrated limitations and needs of the respondent and issue orders that will encourage development of the respondent's maximum self-determination and independence. The court may not establish a full conservatorship if a limited conservatorship, protective arrangement instead of conservatorship, or other less restrictive alternative would meet the needs of the respondent.

Comment

Section 401, which replaces a section with the same number in the 1997 act, covers the standard for appointment of a conservator for both minors and adults. The standard for minors, however, differs from that for adults. This reflects a recognition that adults have rights that children do not have. It also reflects a recognition that a conservatorship for a minor is necessarily time-limited, whereas a conservatorship for an adult can continue indefinitely.

Under subsection (a)(1) of this section, a conservator may be appointed for a minor only if the court finds by a preponderance of evidence that appointment is in the minor's best interest. In determining whether the appointment is in the minor's best interest, the court must give weight to any relevant recommendation of the parent of the minor. This requirement is designed both to protect the minor and to provide adequate deference to parental rights, in accordance with the U.S. Supreme Court's ruling in *Troxel v. Granville*, 530 U.S. 57 (2000).

Subsection 401(a) further limits appointment of conservators for minors to situations where there is a sufficient need for a conservator. Subsection (a)(2) creates an exclusive list of circumstances for which a sufficient need can be found.

Under subsection (b), a conservator may be appointed for an adult only if the court makes three findings by clear-and-convincing evidence. First, the court must find that the adult cannot manage property or financial affairs either because (1) of a limitation in the adult's ability to receive or evaluate information or make or communicate decisions even with appropriate supportive services, technological assistance, or supported decision making, or (2) the adult is missing, detained, or unable to return to the United States. Thus, if the adult's needs could be met by providing the individual with support for decision making, adaptive devices, caregiving services, or a wide variety of other interventions that remove fewer rights than conservatorship, the court may not impose a conservatorship. Second, the court must find that appointment is necessary to either (1) avoid harm to the adult or significant dissipation of the adult's property; or (2) to provide support for the adult or for an individual entitled to such support from the adult. Third, the court must find that the adult's needs cannot be met by a less restrictive alternative. Notably, the mere fact that the adult is making financial choices that are objectively imprudent, or seem wasteful to others, is not a sufficient reason to impose a conservatorship.

As set forth under subsection (c), a conservator may never be granted powers that are not in fact required by the individuals' demonstrated limitations and needs. Thus, most conservatorships should be limited, not full, as almost all respondents possess some ability to act or make decisions on their own behalf. For example, an adult might have the ability to manage small amounts of discretionary spending money even if not the ability to manage his or her full financial affairs.

Overall, as in the Article 3 provisions on guardianship of adults, the section's emphasis on less restrictive alternatives, a high evidentiary standard, and the use of limited conservatorship is consistent with the act's philosophy that a conservator should be appointed only when necessary, only for as long as necessary, and with only those powers as are necessary. While the standard for appointment of a conservator for an adult under this section is similar to the standard for appointment of a guardian for an adult under Section 301, the two standards are distinct. The fact that one is satisfied does not indicate that the other is satisfied.

SECTION 402. PETITION FOR APPOINTMENT OF CONSERVATOR.

(a) The following may petition for the appointment of a conservator:

(1) the individual for whom the order is sought;

(2) a person interested in the estate, financial affairs, or welfare of the individual, including a person that would be adversely affected by lack of effective management of property or financial affairs of the individual; or

(3) the guardian for the individual.

(b) A petition under subsection (a) must state the petitioner's name, principal residence,

current street address, if different, relationship to the respondent, interest in the appointment, the name and address of any attorney representing the petitioner, and, to the extent known, the following:

(1) the respondent's name, age, principal residence, current street address, if different, and, if different, address of the dwelling in which it is proposed the respondent will reside if the petition is granted;

(2) the name and address of the respondent's:

(A) spouse [or domestic partner] or, if the respondent has none, an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period before the filing of the petition;

(B) adult children or, if none, each parent and adult sibling of the respondent, or, if none, at least one adult nearest in kinship to the respondent who can be found with reasonable diligence; and

(C) adult stepchildren whom the respondent actively parented during the stepchildren's minor years and with whom the respondent had an ongoing relationship during the two years immediately before the filing of the petition;

(3) the name and current address of each of the following, if applicable:

(A) a person responsible for the care or custody of the respondent;

(B) any attorney currently representing the respondent;

(C) the representative payee appointed by the Social Security Administration for the respondent;

(D) a guardian or conservator acting for the respondent in this state or another jurisdiction;

(E) a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary;

(F) the fiduciary appointed for the respondent by the Department of Veterans Affairs;

(G) an agent designated under a [power of attorney for health care] in which the respondent is identified as the principal;

(H) an agent designated under a power of attorney for finances in which the respondent is identified as the principal;

(I) a person known to have routinely assisted the respondent with decision making in the six-month period immediately before the filing of the petition;

(J) any proposed conservator, including a person nominated by the respondent, if the respondent is 12 years of age or older; and

(K) if the individual for whom a conservator is sought is a minor:

(i) an adult not otherwise listed with whom the minor resides; and

(ii) each person not otherwise listed that had primary care or custody of the minor for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition;

(4) a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of other anticipated income or receipts;

(5) the reason conservatorship is necessary, including a brief description of:

(A) the nature and extent of the respondent's alleged need;

(B) if the petition alleges the respondent is missing, detained, or unable to return to the United States, the relevant circumstances, including the time and nature of the disappearance or detention and any search or inquiry concerning the respondent's whereabouts;

(C) any protective arrangement instead of conservatorship or other less restrictive alternative for meeting the respondent's alleged need which has been considered or implemented;

(D) if no protective arrangement or other less restrictive alternatives have been considered or implemented, the reason it has not been considered or implemented; and

(E) the reason a protective arrangement or other less restrictive alternative is insufficient to meet the respondent's need;

(6) whether the petitioner seeks a limited conservatorship or a full conservatorship;

(7) if the petitioner seeks a full conservatorship, the reason a limited conservatorship or protective arrangement instead of conservatorship is not appropriate;

(8) if the petition includes the name of a proposed conservator, the reason the proposed conservator should be appointed;

(9) if the petition is for a limited conservatorship, a description of the property to be placed under the conservator's control and any requested limitation on the authority of the conservator;

(10) whether the respondent needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings; and

(11) the name and address of an attorney representing the petitioner, if any.

Comment

This section lists the information that must be contained in the petition for appointment of a conservator. This section represents a substantial revision of Section 403 of the 1997 act. The title of the section has been changed from "Original Petition for Appointment or Protective Order" to "Petition for Appointment of Conservator." In the 1997 act, the term "protective order" referred to both conservatorships and court orders instead of conservatorship. This act makes two advancements. First, it reflects the move away from using the term "protective order." This terminology was found to be confusing by many, in part because the term "protective order" is frequently used in the context of domestic violence to refer to restraining orders. Second, it reflects the fact that court orders instead of conservatorship are now controlled by provisions in Article 5.

Although subsection (a)(1) of this section allows adults to petition for appointment of a conservator for themselves, the court should scrutinize such petitions closely to confirm that they are truly voluntary, and that petitioners fully understand the nature and consequences of petitioning. Normally, where an adult seeks to obtain assistance, it is preferable for the adult to execute a durable power of attorney, engage in supported decision making, or both.

Subsection (b)(1) requires the petitioner to state the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made or the protective arrangement instead of conservatorship is ordered. This provision is designed to alert the respondent, and others who receive notice of the petition, of potential consequences of the conservatorship that are likely to raise concerns. Giving the respondent, and those entitled to a copy of the petition under Section 403, full information will enable them to make more informed decisions about whether to oppose the petition, oppose appointment of the petitioner as conservator, or seek to limit the powers granted to the conservator.

Subsections (b)(2)-(3) require that the petition list family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 403. These persons will likely have the greatest interest in protecting the respondent and in making certain that the proposed conservatorship is appropriate.

Subsection (b)(2)(A) requires that the petition contain the name and address of the respondent's spouse or domestic partner (if the enacting state uses the term) or, if none, then an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period immediately before the filing of the petition. This is a change from Section 403 of the 1997 act, which omitted the term "domestic partner," and required notice to a person with whom the respondent has resided for more than six months before the filing of the petition. By requiring shared household responsibilities, and not simply co-residence, the new language better captures the underlying intent of the provision: providing notice to individuals with whom the respondent has a close personal relationship.

Subsection (b)(2)(B) also requires that the petition contain the names and addresses of the respondent's adult children or, if none, parents and adult brothers and sisters or, if none, an adult relative of the nearest degree in which a relation can be found. If there are no adult children,

parents, or adult siblings and there are several adults of equal degree of kinship to the respondent, the name and address of one is all that is required, not the names and addresses of the members of the entire class.

Subsection (b)(2)(C) requires the petition to list adult stepchildren whom the respondent parented during their minority and with whom the respondent had an ongoing relationship in the two-year period immediately before the filing of the petition. This is an expansion from Section 403 of the 1997 act, which did not require notice to adult stepchildren, and is designed to better reflect the diversity of family structures.

Subsection (b)(3) requires the petition to list a series of other persons who must be provided notice, including existing agents and decision-making supporters. Notice to such individuals, as required by Section 403, is especially critical for ascertaining whether a conservatorship is necessary. For example, the court may conclude that there is no need to appoint a conservator if a conservator has already been appointed elsewhere, or the respondent has executed a durable power of attorney for finances.

In addition, if the respondent is a minor, subsection (b)(3)(K) requires the petitioner to list an adult not otherwise listed with whom the minor resides. If the minor resides with more than one other such adult, the petitioner can choose to only list one. In addition, if the respondent is a minor, the petitioner is to list persons not otherwise listed who had primary care or custody for a certain period of time. These time periods roughly equate to the equivalent of at least two months in the two years immediately before the filing of the petition, or the equivalent of two years out of the five years immediately before the filing of the petition.

While the list of persons who must be included in subsection (b)(3) appears quite lengthy, in reality the number of persons listed is likely to be rather small as the roles listed typically overlap.

Subsection (b)(4) requires a general statement regarding the respondent's property, anticipated income, and other financial affairs. This information should be as detailed as possible to enable the visitor to better complete the report required by Section 405, and to enable the court to determine whether a conservatorship or other protective arrangement is necessary.

Subsection (b)(5) emphasizes that conservatorship is a last resort and that less restrictive alternatives are to be preferred. The petitioner is required to identify all less restrictive alternatives for meeting that respondent's alleged needs that have been considered or implemented, to justify any failure to pursue less restrictive alternatives, and to explain why less restrictive alternatives would not meet the respondent's alleged needs. These requirements serve to provide the court with important information relevant to whether conservatorship is appropriate. These also prompt would-be petitioners to explore less restrictive alternatives.

Subsection (b)(6) requires that the petition state whether a limited or full conservatorship is being sought. Subsections (b)(7) and (b)(9) emphasize the importance of limited conservatorship, the encouragement of which is a major theme of this act. When requesting a full conservatorship, the petition must state why a limited conservatorship or protective arrangement instead of

conservatorship would not meet the respondent's needs. If a limited conservatorship is requested, the petition must set out a description of the property to be placed under the conservator's control and any requested limitation on the authority of the conservator.

Subsection (b)(8) requires the petition to justify the nomination of any proposed appointee. Notably, the petition need not include a proposed conservator. If it does, however, the petitioner must explain why the petitioner believes the proposed conservator should be appointed.

Finally, subsection (b)(10), requires the petitioner to set forth respondent's need, if any, for an interpreter, translator, or other form of support to effectively communicate with the court or understand court proceedings. Thus, if the respondent uses another person to help the respondent communicate or understand, the petitioner should include this information.

To help petitioners satisfy the requirements of this section, Section 603 contains a sample petition form which petitioners may use.

SECTION 403. NOTICE AND HEARING FOR APPOINTMENT OF CONSERVATOR.

(a) On filing of a petition under Section 402 for appointment of a conservator, the court shall set a date, time, and place for a hearing on the petition.

(b) A copy of a petition under Section 402 and notice of a hearing on the petition must be served personally on the respondent. If the respondent's whereabouts are unknown or personal service cannot be made, service on the respondent must be made by [substituted service] [or] [publication]. The notice must inform the respondent of the respondent's rights at the hearing, including the right to an attorney and to attend the hearing. The notice must include a description of the nature, purpose, and consequences of granting the petition. The court may not grant a petition for appointment of a conservator if notice substantially complying with this subsection is not served on the respondent.

(c) In a proceeding on a petition under Section 402, the notice required under subsection (b) must be given to the persons required to be listed in the petition under Section 402(b)(1) through (3) and any other person interested in the respondent's welfare the court determines.

Failure to give notice under this subsection does not preclude the court from appointing a conservator.

(d) After the appointment of a conservator, notice of a hearing on a petition for an order under this [article], together with a copy of the petition, must be given to:

(1) the individual subject to conservatorship, if the individual is 12 years of age or older and not missing, detained, or unable to return to the United States;

(2) the conservator; and

(3) any other person the court determines.

Comment

This section is similar to Section 404 of the 1997 act except that subsection (d) of this section also addresses notice requirements for hearings on petitions filed after the appointment of a conservator.

On filing of the petition, subsection (a) requires that the court set a date, time, and place for the hearing. Subsection (b) requires that the respondent be personally served with the petition and notice of hearing unless the respondent is missing or personal service cannot be made, in which event the state's method for substituted service must be used. A failure to serve the respondent is jurisdictional, as is notice that does not substantially comply with the requirements of subsection (b). Notice of hearing must be given to the persons who are listed in the petition, but as provided in subsection (c) failing to give notice to those listed (other than the respondent) is not jurisdictional. The purpose of providing notice to the others listed in the petition is because they may have information that is useful to the court. They are not indispensable parties for the resolution of the case. If notice to them were made jurisdictional, the proceeding would have to be dismissed or continued if one of them could not be immediately located. This would delay and otherwise complicate the proceeding.

The notice of hearing not only informs the respondent and others of the date of the hearing and the contents of the petition, but it must also include a statement of rights. Subsection (b) requires the notice to inform the respondent of the respondent's rights at the hearing, including the right to be represented by an attorney and the right to attend the hearing. The notice must also include a description of the nature and purpose of the hearing, and the consequences of granting the petition.

Subsection (d) addresses the notice requirements for hearings on petitions for orders subsequent to the appointment of a conservator. The individual subject to conservatorship (unless missing, detained, unable to return to the United States, or under the age of 12), the conservator, and anyone else the court directs, must be given copies of any notice of hearing and a copy of any

petition. This provision helps ensure that the individual is kept informed of developments. In its original conservatorship order, the court should direct that notice of future hearings be given to any other party who, in the court's view, will help to monitor the conservator and protect the interest of the person subject to conservatorship.

Notice under this section is also governed by the general notice requirements for hearings under Section 113, which requires that notice be given at least 14 days prior to the hearing.

SECTION 404. ORDER TO PRESERVE OR APPLY PROPERTY WHILE PROCEEDING PENDING. While a petition under Section 402 is pending, after preliminary hearing and without notice to others, the court may issue an order to preserve and apply property of the respondent as required for the support of the respondent or an individual who is in fact dependent on the respondent. The court may appoint a [master] to assist in implementing the order.

Legislative Note: *The term "master" is bracketed in recognition that states have different terms for this role.*

Comment

This section parallels language that was in Section 406(g) of the 1997 act. It allows the court to enter an order to protect the property of the respondent while the petition for conservatorship is pending. It also allows the court to enter an order to provide for the support of the respondent, or someone who is in fact dependent on the respondent, while the petition is pending. The descriptor "in fact dependent" refers to an individual who is in fact receiving support from the respondent. Whether the individual is a "dependent" for income tax purposes is not determinative.

SECTION 405. APPOINTMENT AND ROLE OF [VISITOR].

(a) If the respondent in a proceeding to appoint a conservator is a minor, the court may appoint a [visitor] to investigate a matter related to the petition or inform the minor or a parent of the minor about the petition or a related matter.

(b) If the respondent in a proceeding to appoint a conservator is an adult, the court shall appoint a [visitor] [unless the adult is represented by an attorney appointed by the court]. The duties and reporting requirements of the [visitor] are limited to the relief requested in the

petition. The [visitor] must be an individual with training or experience in the type of abilities, limitations, and needs alleged in the petition.

(c) A [visitor] appointed under subsection (b) for an adult shall interview the respondent in person and in a manner the respondent is best able to understand:

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing on the petition, and the general powers and duties of a conservator;

(2) determine the respondent's views about the appointment sought by the petitioner, including views about a proposed conservator, the conservator's proposed powers and duties, and the scope and duration of the proposed conservatorship;

(3) inform the respondent of the respondent's right to employ and consult with an attorney at the respondent's expense and the right to request a court-appointed attorney; and

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, may be paid from the respondent's assets.

(d) A [visitor] appointed under subsection (b) for an adult shall:

(1) interview the petitioner and proposed conservator, if any;

(2) review financial records of the respondent, if relevant to the [visitor's] recommendation under subsection (e)(2);

(3) investigate whether the respondent's needs could be met by a protective arrangement instead of conservatorship or other less restrictive alternative and, if so, identify the arrangement or other less restrictive alternative; and

(4) investigate the allegations in the petition and any other matter relating to the petition the court directs.

(e) A [visitor] appointed under subsection (b) for an adult promptly shall file a report in a record with the court, which must include:

(1) a recommendation whether an attorney should be appointed to represent the respondent;

(2) a recommendation:

(A) regarding the appropriateness of conservatorship, or whether a protective arrangement instead of conservatorship or other less restrictive alternative for meeting the respondent's needs is available;

(B) if a conservatorship is recommended, whether it should be full or limited; and

(C) if a limited conservatorship is recommended, the powers to be granted to the conservator, and the property that should be placed under the conservator's control;

(3) a statement of the qualifications of the proposed conservator and whether the respondent approves or disapproves of the proposed conservator;

(4) a recommendation whether a professional evaluation under Section 407 is necessary;

(5) a statement whether the respondent is able to attend a hearing at the location court proceedings typically are held;

(6) a statement whether the respondent is able to participate in a hearing and which identifies any technology or other form of support that would enhance the respondent's ability to participate; and

(7) any other matter the court directs.

Legislative Note: *The term "visitor" is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.*

Comment

Subsections (a) and (b) govern when a court may and must appoint a visitor. A court *may* appoint a visitor upon receipt of a petition for conservatorship of a minor under Section 402. A court *must* appoint a visitor upon receipt of a petition for conservatorship of an adult under Section 402 unless: (1) the enacting state has included the bracketed language that no such appointment is required if the adult is represented by an attorney appointed by the court; and (2) the court has in fact appointed an attorney to represent the adult. Notably, if the adult is represented by an attorney appointed by the court, the court may still appoint a visitor if it so chooses. "Visitor" is bracketed in recognition that states use, and may wish to substitute, different words to refer to this position.

Subsection (b) differs from Section 406(a) of the 1997 act in that it includes bracketed language to give states the option of not appointing a visitor where the court has appointed counsel for the adult. The decision to limit the exception to situations where the adult is represented by court-appointed counsel, as opposed to all situations where the adult is represented by counsel, reflects concerns that the attorney purporting to represent a respondent in such proceedings may have a conflict of interest or be influenced by others.

Visitors may be selected from a variety of professions, including physicians, psychologists, social workers, or nurses, among others. Regardless of the visitor's profession, subsection (b) requires the visitor to have training and experience in the type of abilities, limitations, and needs alleged in the petition. This training and experience should be sufficient so that the visitor may serve as the "eyes and ears" of the court. Thus, for example, a visitor appointed for a respondent alleged to have Alzheimer's disease must have training or experience in assessing the needs of those with Alzheimer's disease. As the appropriate disposition of the petition may well depend on what services are available to the respondent, the visitor should also be knowledgeable about less restrictive alternatives, including supportive services in the respondent's community. As the visitor's role is to provide objective information to the court, it is essential that the visitor not have a conflict of interest. For example, the visitor should not be an employee of an institution where the respondent resides. Similarly, the petitioner should not nominate a visitor, and any such nomination should be disregarded by the court.

Under subsection (c), the visitor is tasked with interviewing the respondent in person and explaining to the respondent the nature and potential consequences of the petition and the respondent's rights. The visitor must determine the respondent's views about the appointment or order sought. This includes the respondent's views about any proposed conservator, as such views will help the court to determine who—if anyone—to appoint as conservator consistent with Section 410(a)(2) and (b). The visitor should communicate in plain language and in a language in which the respondent is proficient, accompanied by a qualified and disinterested interpreter if an interpreter is needed to communicate successfully with the respondent. While the visitor is not required to speak the respondent's primary language, it is best practice to use visitors who do. Where this is not practicable, then both good practice and due process dictate the use of interpreters so the respondent can understand and communicate. If assistive devices are needed for the visitor to explain to the respondent in a manner the respondent can understand,

or for the respondent to communicate with the visitor, then the visitor should use those assistive devices.

Under subsection (d), the visitor is also tasked with interviewing the petitioner and the proposed conservator, reviewing the financial records of the respondent if relevant to the visitor's recommendation, investigating whether the respondent's needs could be met by a less restrictive alternative, and investigating the allegations in the petition and any other matter relating to the petition the court directs. Unlike a visitor appointed for a respondent in a guardianship proceeding under Article 3, the visitor is not necessarily required to obtain information from a physician or other persons who have treated, advised, or assessed the respondent's physical and mental condition. However, the visitor may need to do so in order to sufficiently investigate the allegations contained in the petition and less restrictive alternatives.

As set forth in subsection (e), the visitor is responsible for reporting to the court on a variety of matters about which the court will need information to act on the petition. The visitor's report must be in a record and include a list of recommendations or statements. Specifically, the visitor's report must contain information and recommendations to the court regarding the appropriateness of the conservatorship, whether lesser restrictive alternatives might meet the respondent's needs, recommendations about further evaluations, powers to be given the conservator, if a limited conservatorship is requested, the property to be placed under the conservator's control, and the appointment of counsel. The visitor's report also might appropriately include a recommendation concerning bond under Section 416 and whether an alternate asset-protection arrangement should be considered. States enacting this act should consider developing a visitor's checklist for the items enumerated in subsection (e).

If the petition is withdrawn prior to the appointment of a visitor, no appointment of a visitor is necessary.

While appointment of a visitor is not without financial cost, appointment of visitors may reduce the states' overall costs by avoiding unnecessary conservatorships. Courts faced with limited resources may also wish to consider using volunteer visitor programs. *See* American Bar Association Commission on Law and Aging, *Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community* (2011).

SECTION 406. APPOINTMENT AND ROLE OF ATTORNEY.

Alternative A

(a) The court shall appoint an attorney to represent the respondent in a proceeding to appoint a conservator if:

(1) the respondent requests an appointment;

(2) the [visitor] recommends an appointment; or

(3) the court determines the respondent needs representation.

Alternative B

(a) Unless the respondent in a proceeding for appointment of a conservator is represented by an attorney, the court shall appoint an attorney to represent the respondent, regardless of the respondent's ability to pay.

End of Alternatives

(b) An attorney representing the respondent in a proceeding for appointment of a conservator shall:

(1) make reasonable efforts to ascertain the respondent's wishes;

(2) advocate for the respondent's wishes to the extent reasonably ascertainable; and

(3) if the respondent's wishes are not reasonably ascertainable, advocate for the result that is the least-restrictive in type, duration, and scope, consistent with the respondent's interests.

[(c) The court shall appoint an attorney to represent a parent of a minor who is the subject of a proceeding under Section 402 if:

(1) the parent objects to appointment of a conservator;

(2) the court determines that counsel is needed to ensure that consent to appointment of a conservator is informed; or

(3) the court otherwise determines the parent needs representation.]

Legislative Note: *A state that enacts Alternative B should not enact Section 405(e)(1).*

Subsection (c) is in brackets because states have differing policies regarding the rights of parents in these cases.

Comment

Similar to Section 406(b) of the 1997 act, alternative provisions on the appointment of an attorney are offered in subsection (a). Alternative A relies on the use of a "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of an attorney, nevertheless, is required under Alternative A when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor. Alternative A is in accord with the National Probate Court Standards. National Probate Court Standards, Standard 3.3.5 "Appointment of Counsel" (2013) provides:

> (a) Counsel should be appointed by the probate court to represent the respondent when:
> (1) requested by an unrepresented respondent;
> (2) recommended by a court visitor;
> (3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
> (4) otherwise required by law.
> (b) The role of counsel should be that of an advocate for the respondent.

It is expected that courts in states enacting Alternative A of subsection (b), will appoint counsel in virtually all cases in which the respondent would otherwise be unrepresented. In such jurisdictions, courts should err on the side of protecting the respondent's rights by finding, absent a compelling reason otherwise, that the respondent needs representation. It should be the rare case in which the court does not find that an unrepresented respondent is in need of representation. Visitors in such jurisdictions should also be sensitive to the fact that the respondent may lack the ability to knowingly waive appointment of counsel.

In light of these concerns and in the interest of providing full due process to respondents, states may wish instead to adopt Alternative B, which provides for mandatory appointment of counsel. Mandatory appointment has been strongly urged by the American Bar Association (A.B.A.) Commission on Law and Aging and helps ensure the respondent's rights are fully represented and protected in the proceeding.

Subsection (b), which is new to the act, specifies the role of the attorney for the respondent, regardless of whether the state has chosen alternative A or B. It specifies that the attorney must make reasonable efforts to ascertain what the respondent wishes and must advocate for those wishes. This has the effect of directing the attorney to maintain a normal attorney-client relationship with the respondent. A.B.A. Model Rule of Professional Conduct 1.14, which is also applicable here, directs the attorney to maintain, as far as reasonably possible, a normal attorney-client relationship with a client of diminished capacity, and provides guidance on what may be done if maintaining a normal attorney-client relationship becomes difficult. Subsection (b) is in accord with National Probate Court Standards, Standard 3.3.5 "Appointment of Counsel" (2013), which provides that "[t]he role of counsel should be that of an advocate for the respondent."

Subsection (c), which is in brackets, gives states the option of creating a limited right to

appointed counsel for parents whose minor children are the subject of a proceeding under Section 402. Subsection (c), if enacted, would require the court to appoint an attorney to represent such a parent if the parent objected to appointment of a conservator, the parent appeared to be consenting to appointment of a conservator but the court determined that counsel was needed to make sure that consent was informed, or the court otherwise determined that the parent needed counsel. Subsection (c) is designed not only to protect the interests of parents, but also to potentially empower parents to better protect the rights of their minor children. In determining whether to enact subsection (c), states should consider the substantial benefit of representation in protecting parents' fundamental rights and the important interest in parenting their own children.

SECTION 407. PROFESSIONAL EVALUATION.

(a) At or before a hearing on a petition for conservatorship for an adult, the court shall order a professional evaluation of the respondent:

(1) if the respondent requests the evaluation; or

(2) in other cases, unless the court finds it has sufficient information to determine the respondent's needs and abilities without the evaluation.

(b) If the court orders an evaluation under subsection (a), the respondent must be examined by a licensed physician, psychologist, social worker, or other individual appointed by the court who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations and will not be advantaged or disadvantaged by a decision to grant the petition or otherwise have a conflict of interest. The individual conducting the evaluation promptly shall file a report in a record with the court. Unless otherwise directed by the court, the report must contain:

(1) a description of the nature, type, and extent of the respondent's cognitive and functional abilities and limitations with regard to the management of the respondent's property and financial affairs;

(2) an evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(3) a prognosis for improvement with regard to the ability to manage the respondent's property and financial affairs; and

(4) the date of the examination on which the report is based.

(c) A respondent may decline to participate in an evaluation ordered under subsection (a).

Comment

Section 407 requires a court to order a professional evaluation of the respondent in a conservatorship proceeding in two circumstances, which parallel the circumstances under which a professional evaluation of an adult respondent in a guardianship proceeding is required under Section 306. Section 407 of this act is a departure from Section 406(f) of the 1997 act, which left the decision of whether and when to order a professional evaluation of a respondent in a conservatorship proceeding to the discretion of the court. This departure reflects a recognition of the profound implications of imposition of a conservatorship on the rights and well-being of the individual subject to conservatorship, and the importance of limiting appointments to situations where there is a need which cannot be satisfied by a less restrictive alternative.

First, under subsection (a)(1), the court must order a professional evaluation when such an evaluation is demanded by the respondent. When represented by counsel, the respondent may demand the evaluation through counsel. If the respondent is truly incapacitated and not represented by counsel, it is unlikely that the respondent will demand an evaluation. However, the court still can order a professional evaluation either on the visitor's recommendation or on its own motion.

Second, under subsection (a)(2), the court must order a professional evaluation of the respondent unless the court explicitly finds it has sufficient information to determine both the respondent's needs and abilities without that evaluation. Consistent with this requirement, a court should order a professional evaluation any time that the nature and scope of the respondent's abilities, limitations, and needs are not absolutely clear based on its own assessment and on the visitor's report. By providing the court with an expert evaluation of the respondent's abilities and limitations, the professional evaluation not only helps the court determine whether a guardianship is necessary, but also helps the court determine how to craft an appropriate limited guardianship.

If an evaluation is ordered, subsection (b) requires it to be performed by a professional who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations. Subsection (b) lists examples of types of individuals who might reasonably conduct a professional evaluation. The list parallels that in Section 306.

Subsection (b) requires the professional to evaluate the individual's abilities and limitations regarding the management of the respondent's property and financial affairs. This is important because an individual's functional needs will likely reflect the interaction between abilities and

limitations. As part of the evaluation described in subsection (b), the professional evaluator should generally include a summary of the consultation with the respondent's treating physician.

Subsection (c) recognizes the right of the respondent to decline to participate in the evaluation. A respondent might so decline because of concern about undue invasion of privacy. However, if the respondent refuses participation, the court will have less information on which to base its conclusion. For those respondents who wish to avoid imposition of a conservatorship, this may be particularly problematic as the bulk of the court's information may thus end up being supplied by the petitioner.

SECTION 408. ATTENDENCE AND RIGHTS AT HEARING.

(a) Except as otherwise provided in subsection (b), a hearing under Section 403 may not proceed unless the respondent attends the hearing. If it is not reasonably feasible for the respondent to attend a hearing at the location court proceedings typically are held, the court shall make reasonable efforts to hold the hearing at an alternative location convenient to the respondent or allow the respondent to attend the hearing using real-time audio-visual technology.

(b) A hearing under Section 403 may proceed without the respondent in attendance if the court finds by clear-and-convincing evidence that:

(1) the respondent consistently and repeatedly has refused to attend the hearing after having been fully informed of the right to attend and the potential consequences of failing to do so;

(2) there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services or technological assistance; or

(3) the respondent is a minor who has received proper notice and attendance would be harmful to the minor.

(c) The respondent may be assisted in a hearing under Section 403 by a person or persons of the respondent's choosing, assistive technology, or an interpreter or translator, or a combination of these supports. If assistance would facilitate the respondent's participation in the

hearing, but is not otherwise available to the respondent, the court shall make reasonable efforts to provide it.

(d) The respondent has a right to choose an attorney to represent the respondent at a hearing under Section 403.

(e) At a hearing under Section 403, the respondent may:

(1) present evidence and subpoena witnesses and documents;

(2) examine witnesses, including any court-appointed evaluator and the [visitor]; and

(3) otherwise participate in the hearing.

(f) Unless excused by the court for good cause, a proposed conservator shall attend a hearing under Section 403.

(g) A hearing under Section 403 must be closed on request of the respondent and a showing of good cause.

(h) Any person may request to participate in a hearing under Section 403. The court may grant the request, with or without a hearing, on determining that the best interest of the respondent will be served. The court may impose appropriate conditions on the person's participation.

Comment

Section 408 of the 1997 act required that both the respondent and proposed conservator attend the hearing unless attendance for either was excused for good cause. This section continues the good cause standard for excusing attendance by the proposed conservator. But due to the importance of attendance by the respondent and a concern that a good cause standard was open to abuse, the revised section spells out in greater detail the circumstances when attendance by the respondent will be excused.

Subsection (a) provides that, except under the unusual circumstances set forth in subsection (b), no hearing on a petition for conservatorship may proceed without the presence of the respondent. The fact that the respondent may not be able to attend the hearing at the location where the court

normally conducts hearings does not justify holding the hearing without the respondent. Rather, the court must try to hold the hearing at a location that the respondent can attend or by using real-time, audio-visual technology. As a general matter, it is preferable to do the former, as in-person interactions will allow the court to observe the respondent's context, which can help the court to understand factors that may be influencing the respondent's behavior and communications. However, real-time, audio-visual technology can provide a reasonable alternative in appropriate situations if the technology allows both the court and respondent to communicate with one another to the best of their abilities.

The exceptions in subsection (b) to the requirement that the respondent must attend the hearing are deliberately very narrow. For the hearing to proceed without the respondent in attendance, the court must find at least one of three things by clear-and-convincing evidence.

The first exception is that the respondent consistently and repeatedly refused to attend the hearing despite being fully informed of the right to attend and potential consequences of not doing so. Thus, for example, a respondent who cannot physically access the courthouse where the hearing is scheduled must understand that she has a right to have the hearing held at an alternative location or by using real-time, audio-visual technology. The respondent should also understand that a conservator could be appointed for her in her absence, and that this appointment could strip her of the right to make important, financial decisions for herself.

The second exception is that there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance. Both parts of this requirement—that the respondent cannot practically attend and that the respondent cannot participate even with support—must be fully satisfied for this exception to apply. The exception should be used very sparingly as best practice is to hold the hearing in the presence of the respondent regardless of the respondent's abilities. Without the respondent's presence the court is relying on third-party information to determine that it is in fact not feasible for the respondent to attend and that the respondent is not being prevented from attending for some other reason. Especially where this information is presented by the petitioner, or does not include a professional evaluation, courts should be extremely hesitant to rely on it to excuse the respondent's presence.

The third exception is that the respondent is a minor who has received proper notice and attendance by the minor would be harmful to the minor. This third exception is the only part of Section 408 which does not mirror Section 307, which governs the attendance and rights at hearings for guardianships for adults. A similar exception does not exist in Section 307 because that section does not apply to minors.

The respondent has the right to take an active role in the hearing, as detailed in subsection (e). Subsection (c) recognizes that to exercise this right, the respondent may need assistance. It therefore provides that the respondent has a right to assistance at the hearing and places an affirmative duty on the court to take reasonable measures to facilitate the respondent receiving that assistance.

As indicated in subsection (d), the respondent has a right to choose an attorney to represent the

respondent at the hearing. The respondent is free to choose an attorney other than the one who would otherwise be appointed by the court. This provision does not govern payment of the attorney. That issue is addressed in Section 119.

Subsection (f) requires the proposed conservator to attend the hearing. The court may excuse the proposed conservator's attendance but this should be rare. This provision is consistent with a recommendation from National Probate Court Standards, Standard 3.3.8(G), "Hearing" (2013). The proposed conservator's presence at the hearing gives the court the opportunity to determine the person's appropriateness for appointment and to make any other inquiry of the person the court deems appropriate as well as to emphasize to the person the gravity of the conservator's responsibilities.

Under subsection (g), the respondent can request that the hearing be closed, but the court may grant the request only upon a showing of good cause.

Under subsection (h), others may make a request to participate, which can be granted by the court without a hearing, if the court finds that the respondent's best interest is served by the participation. The court's order granting the request to participate may include appropriate conditions or limitations.

SECTION 409. CONFIDENTIALITY OF RECORDS.

(a) The existence of a proceeding for or the existence of conservatorship is a matter of public record unless the court seals the record after:

(1) the respondent, the individual subject to conservatorship, or the parent of a minor subject to conservatorship requests the record be sealed; and

(2) either:

(A) the petition for conservatorship is dismissed; or

(B) the conservatorship is terminated.

(b) An individual subject to a proceeding for a conservatorship, whether or not a conservator is appointed, an attorney designated by the individual, and a person entitled to notice under Section 411(e) or a subsequent order may access court records of the proceeding and resulting conservatorship, including the conservator's plan under Section 419 and the conservator's report under Section 423. A person not otherwise entitled to access to court

records under this section for good cause may petition the court for access to court records of the conservatorship, including the conservator's plan and report. The court shall grant access if access is in the best interest of the respondent or individual subject to conservatorship or furthers the public interest and does not endanger the welfare or financial interests of the respondent or individual.

[(c) A report under Section 405 of a [visitor] or professional evaluation under Section 407 is confidential and must be sealed on filing, but is available to:

(1) the court;

(2) the individual who is the subject of the report or evaluation, without limitation as to use;

(3) the petitioner, [visitor], and petitioner's and respondent's attorneys, for purposes of the proceeding;

(4) unless the court directs otherwise, an agent appointed under a power of attorney for finances in which the respondent is identified as the principal; and

(5) any other person if it is in the public interest or for a purpose the court orders for good cause.]

Legislative Note: *Subsection (c) is bracketed in recognition that states have different policies and procedures regarding the sealing of court records.*

Comment

Conservatorship involves highly personal and other data. It is important that the respondent's privacy be protected before and after the appointment. Furthermore, data found in conservatorship records, such as Social Security numbers and information concerning financial accounts, can be used to facilitate fraud. Concern about access by the general public has increased as electronic filing of court records has made these records more accessible.

On the other hand, public access is important. One criticism of conservatorship in some states is that too much happens behind closed doors. The public, and "watch-dog" groups in particular, want to know how the conservatorship system is functioning. In addition, this act encourages

family and others interested in the welfare of the respondent to participate in the proceeding, both before and after the appointment. Sections 402 and 403 working together require that notice of the proceeding be given to family and others whose participation might enhance the proceeding. Section 411(e) encourages the court to establish a list of family and other persons to receive notice of various actions following the appointment. In order for these persons to effectively monitor the conservatorship, they need access to records. However, with the move to electronic filing and increasing concerns about protecting sensitive information, more courts are limiting access to conservatorship records to the immediate parties and their counsel.

This section attempts to balance these conflicting policy concerns. Subsection (a) provides that the existence of the conservatorship case itself is a matter of public record. But even then, similar to the expungement of criminal records, the court has the authority to seal even the existence of the conservatorship if the subject of the proceeding so requests and either the petition for conservatorship was dismissed or, if a conservator was appointed, the conservatorship is terminated.

Subsection (b) addresses access to the underlying records of the conservatorship. In addition to the adult and the adult's attorney, access is granted to persons entitled to notice under Section 411(e), including the guardian's plan under Section 419 and report under Section 423. Other persons must petition for access. The court shall grant the petitioner access if access is in the best interest of the adult or is in furtherance of the public interest and does not endanger the welfare or financial interests of the adult.

The documents most likely to contain highly sensitive information is the visitor report under Section 405 and professional evaluation under Section 407. Consequently, access to these documents is more restricted than other documents filed, which are covered by subsection (b). Pursuant to subsection (c), access to the visitor or evaluation report is available only to the court, the individual who is the subject of the proceeding and that individual's attorney, the petitioner and petitioner's attorney, and the visitor. Access is also available to agents under powers of attorney for health care or finances unless the court orders otherwise, and to other persons if the court determines it is in the public interest or for other good cause. A partial or complete redaction of sensitive personal or financial information may be a practical solution for courts in balancing the need for disclosure to the public and the interests of family and friends, with the need to protect the individual's privacy and avoid misuse of sensitive data.

Subsection (c) is similar to Section 407 of the 1997 act, but because states vary considerably on their policies with regard to confidentiality in guardianship cases, subsection (c) has been placed in brackets, signaling that states are free to modify the language to match their local practice.

SECTION 410. WHO MAY BE CONSERVATOR; ORDER OF PRIORITY.

(a) Except as otherwise provided in subsection (c), the court in appointing a conservator shall consider persons qualified to be a conservator in the following order of priority:

(1) a conservator, other than a temporary or emergency conservator, currently

acting for the respondent in another jurisdiction;

(2) a person nominated as conservator by the respondent, including the respondent's most recent nomination made in a power of attorney for finances;

(3) an agent appointed by the respondent to manage the respondent's property under a power of attorney for finances;

(4) a spouse [or domestic partner] of the respondent; and

(5) a family member or other individual who has shown special care and concern for the respondent.

(b) If two or more persons have equal priority under subsection (a), the court shall select as conservator the person the court considers best qualified. In determining the best qualified person, the court shall consider the person's relationship with the respondent, the person's skills, the expressed wishes of the respondent, the extent to which the person and the respondent have similar values and preferences, and the likelihood the person will be able to perform the duties of a conservator successfully.

(c) The court, acting in the best interest of the respondent, may decline to appoint as conservator a person having priority under subsection (a) and appoint a person having a lower priority or no priority.

(d) A person that provides paid services to the respondent, or an individual who is employed by a person that provides paid services to the respondent or is the spouse, [domestic partner,] parent, or child of an individual who provides or is employed to provide paid services to the respondent, may not be appointed as conservator unless:

(1) the individual is related to the respondent by blood, marriage, or adoption; or

(2) the court finds by clear-and-convincing evidence that the person is the best

qualified person available for appointment and the appointment is in the best interest of the respondent.

(e) An owner, operator, or employee of [a long-term-care institution] at which the respondent is receiving care may not be appointed as conservator unless the owner, operator, or employee is related to the respondent by blood, marriage, or adoption.

Legislative Note: *Each state enacting the act needs to insert in subsection (e) the particular term or terms used in the state or statutory references for facilities considered long-term care institutions.*

Comment

This section specifies who has priority for appointment as conservator (subsection (a)), specifies how to resolve a dispute if two or more persons have an equal priority (subsection (b)), empowers the court to select someone with lower priority in appropriate circumstances (subsection (c)), and specifies certain caregivers and others who are automatically disqualified from being appointed as conservator (subsections (d)-(e)).

Subsection (a) of this section gives top priority for appointment as conservator to a conservator who has already been appointed for the respondent by another court. Existing conservators are granted first priority for two reasons. First, some cases will involve transfers of a conservatorship from another state. To assure a smooth transition, the currently appointed conservator, whether appointed in this state or another, should have priority for appointment at the new location. Second, other cases will involve situations where a conservatorship appointment is sought despite the appointment in another place. Granting the existing conservator priority will deter such forum shopping. If the existing conservator is inappropriate for some reason, subsection (c) permits the court to pass over the existing conservator and appoint another with or without priority. This approach is consistent with Uniform Adult Guardianship and Protective Proceeding Jurisdiction Act's respect for out-of-state appointments

While an existing conservator is generally granted first priority for appointment, a temporary substitute conservator and an emergency conservator are excluded from priority because of the short-term nature of their involvement and because their appointment may have been made with a less thorough and inclusive process than that required for a conservator appointed for an indefinite period.

Subsection (a)(2) grants second priority to a person nominated as conservator by the respondent. The nomination may include anyone nominated orally at the hearing or communicated to the visitor, if the respondent is able to express a preference. The nomination may also be made in a separate document. While it is generally good practice for an individual to nominate as the conservator the agent named in a power of attorney for finances, subsection (a)(3) grants such an agent third priority for appointment even in the absence of a specific nomination. The agent is

granted priority on the theory that the agent is the person the respondent would most likely prefer to act with respect to the respondent's finances. The nomination of the agent will also make it more difficult for someone to use a conservatorship to thwart the authority of the agent. To assure the agent will be in a position to assert this priority, Section 402 and Section 403 work together to require the agent to receive notice of the proceeding.

Subsection (a)(4) grants fourth priority to the respondent's spouse or domestic partner but the section does not otherwise grant a priority to specific relatives. Rather, subsection (a)(5) gives a final level of priority to any family member or other person who has shown special care and concern for the respondent. This section represents a significant change from Section 413 of the 1997 act, which also created a priority for an adult child followed by a parent. The decision to collapse the strict kinship hierarchy into a single category other than for the spouse or domestic partner reflects a recognition that the court should favor those who have shown care for and about the respondent, an understanding that the act should be sensitive to respondents' diverse family structures and systems, and a concern that a strict hierarchy based on kinship may result in appointments that are not in the best interest of respondents.

Subsection (b) provides the court with a framework for selecting among persons with equal priority. This framework is especially important given the collapse of the detailed family hierarchy into a single category in subsection (a)(4) for the spouse or domestic partner with all other family members and others who have shown special care and concern for the respondent having equal priority under subsection (a)(5). Under subsection (b), a court shall choose the best qualified person when selecting among those with equal priority. In determining who is best qualified, the court should consider the potential conservator's relationship with the respondent, the potential conservator's skills, the expressed wishes of the respondent, the extent to which the potential conservator and the respondent have similar values and preferences, and the likelihood that the potential conservator will be able to successfully perform the duties of a conservator. Thus, whether a person is best qualified depends, in large part, on the quality of their relationship with the respondent. Since surrogate decision makers typically make the decisions for others that they would want made for themselves, requiring the court to consider the extent to which the potential conservator and the respondent share values and preferences increases the likelihood that the selected conservator will make the decision the individual subject to conservatorship would have made if able. *See* Nina A. Kohn, *Matched Values & Preferences: A New Approach to Selecting Legal Surrogates*, 22 SAN DIEGO L. REV. 399 (2015).

Consistent with respecting the wishes of the individual and appointing a person who understands the respondent's values and preferences, courts should resist the temptation to appoint a professional conservator simply because it is difficult to choose among family members and friends. While a professional conservator avoids the need to select between family members who are feuding or who are otherwise in disagreement, appointment of a professional is likely not to be consistent with the respondent's wishes. The extensive literature on surrogate decision-making shows that people typically prefer to have decisions made by close family members. *See* Nina A. Kohn, *Matched Values & Preferences: A New Approach to Selecting Legal Surrogates*, 22 SAN DIEGO L. REV. 399 (2015). In addition, appointment of a professional conservator comes at significant financial cost to the respondent.

Subsection (d) limits appointment as conservator of persons who provide paid services to respondents, as well as the affiliates of those who provide paid services. Subsection (e) more specifically prohibits an owner, operator, or employee of a long-term care institution at which the respondent is receiving care from being appointed as conservator unless related to the respondent by blood, marriage, or adoption. Strict application of these subsections is crucial to avoid a conflict of interest and to protect the individual subject to conservatorship.

SECTION 411. ORDER OF APPOINTMENT OF CONSERVATOR.

(a) A court order appointing a conservator for a minor must include findings to support appointment of a conservator and, if a full conservatorship is granted, the reason a limited conservatorship would not meet the identified needs of the minor.

(b) A court order appointing a conservator for an adult must:

(1) include a specific finding that clear-and-convincing evidence has established that the identified needs of the respondent cannot be met by a protective arrangement instead of conservatorship or other less restrictive alternative, including use of appropriate supportive services, technological assistance, or supported decision making; and

(2) include a specific finding that clear-and-convincing evidence established the respondent was given proper notice of the hearing on the petition.

(c) A court order establishing a full conservatorship for an adult must state the basis for granting a full conservatorship and include specific findings to support the conclusion that a limited conservatorship would not meet the functional needs of the adult.

(d) A court order establishing a limited conservatorship must state the specific property placed under the control of the conservator and the powers granted to the conservator.

(e) The court, as part of an order establishing a conservatorship, shall identify any person that subsequently is entitled to:

(1) notice of the rights of the individual subject to conservatorship under Section 412(b);

(2) notice of a sale of or surrender of a lease to the primary dwelling of the individual;

(3) notice that the conservator has delegated a power that requires court approval under Section 414 or substantially all powers of the conservator;

(4) notice that the conservator will be unavailable to perform the conservator's duties for more than one month;

(5) a copy of the conservator's plan under Section 419 and the conservator's report under Section 423;

(6) access to court records relating to the conservatorship;

(7) notice of a transaction involving a substantial conflict between the conservator's fiduciary duties and personal interests;

(8) notice of the death or significant change in the condition of the individual;

(9) notice that the court has limited or modified the powers of the conservator; and

(10) notice of the removal of the conservator.

(f) If an individual subject to conservatorship is an adult, the spouse[, domestic partner,] and adult children of the adult subject to conservatorship are entitled under subsection (e) to notice unless the court determines notice would be contrary to the preferences or prior directions of the adult subject to conservatorship or not in the best interest of the adult.

(g) If an individual subject to conservatorship is a minor, each parent and adult sibling of the minor is entitled under subsection (e) to notice unless the court determines notice would not be in the best interest of the minor.

Comment

This section explains what must be included in a court's order appointing a conservator, and the consequences of certain omissions in that order. It contains provisions that are critical both to ensuring that conservatorship orders are properly limited and that parties are aware of the consequences of an appointment. In addition, it contains provisions that facilitate conservatorship monitoring. The section is an update and considerable expansion of Section 409 of the 1997 act.

Subsection (a) requires any court appointing a conservator for a minor to include findings that support that appointment. If the court is establishing a full conservatorship, the order must also explain why a limited conservatorship would not meet the minor's identified needs.

Subsection (b) requires any court appointing a conservator for an adult to specifically state its finding that there is clear-and-convincing evidence that the respondent's identified needs cannot be met by a protective arrangement or other less restrictive alternative. The court must also include a specific finding that there was clear-and-convincing evidence that the respondent was given proper notice.

Subsection (c) requires a court that is creating a full conservatorship for an adult to state the reason for doing so, as well as to provide specific findings that support its conclusion that a limited conservatorship would be inappropriate. This provision is designed to ensure that courts engage in thorough fact-finding and consider less restrictive alternatives and approaches to tailor orders before appointing a full conservator. It also recognizes that it has often been—as a practical matter—easier for courts to appoint a full conservator than a limited one because the former has often allowed the court to avoid the need to make a lengthy finding as to specific rights retained, and to secure additional assessments if needed. Requiring additional fact finding for imposition of full conservatorships helps counter such perverse incentives.

Subsection (d) requires a court order establishing a limited conservatorship for an adult to clearly state the specific property being placed under the conservator's control and the powers that are being granted to the conservator. This statement will then define the scope of the conservatorship. It is important for third parties relying on the order to easily ascertain the conservator's powers. In addition to a clear statement in the order, Section 108(c) requires that the letters of office state any limitations on the conservator's powers or on the property subject to conservatorship.

Subsection (e) requires the court appointing a conservator for an adult to identify any person entitled to notice of the rights of the adult, a copy of the conservator's plan, access to records related to the conservatorship, notice of changes in the appointment, notice of a sale of the adult's primary dwelling or the surrender of the lease to that dwelling, and notice of certain other important events that may occur in the life of the adult or in the course of the conservatorship. The events include a change in the adult's condition, the conservator delegating certain important powers, and the conservator's unavailability to perform key duties.

Subsection (f) requires that the spouse, domestic partner, and adult children of an adult subject to conservatorship be included in the list of persons so entitled to notice under subsection (e) unless the court makes an explicit finding that this would be inconsistent with the preferences or prior directions of the adult, or otherwise not in the adult's best interest. Thus, the default is that the spouse, domestic partner, and adult children are entitled to this notice. It should only be the rare case in which the court does not grant the right to such notice to all persons in these categories. Moreover, where a court is concerned about a particular family member receiving particular information, the court should simply limit the right to that information—and not the right to all information identified in subsection (e).

Subsection (g) sets forth who is to be included in the list of persons entitled to notice under subsection (e) if the individual subject to conservatorship is a minor. Under subsection (g), each parent and adult sibling of a minor subject to conservatorship is entitled to notice under subsection (e) unless the court makes an explicit finding that this would not be in the minor's best interest. Thus, the default is that the parents and adult siblings are entitled to this notice. It should only be the rare case in which the court does not grant the right to such notice to all persons in these categories. Moreover, where a court is concerned about a particular parent or adult sibling receiving particular information, the court should simply limit the right to that information—and not the right to all information identified in subsection (e).

Subsection (e) represents an important innovation in this act. It leverages the interest of private individuals to monitor conservatorships at minimal cost to the public by requiring courts to—absent good cause—order that conservator give to the adult's family or friends notice of certain suspect actions. These individuals on notice can then act as an extra set of eyes and ears for the court to prevent or remedy abuse.

SECTION 412. NOTICE OF ORDER OF APPOINTMENT; RIGHTS.

(a) A conservator appointed under Section 411 shall give to the individual subject to conservatorship and to all other persons given notice under Section 403 a copy of the order of appointment, together with notice of the right to request termination or modification. The order and notice must be given not later than 14 days after the appointment.

(b) Not later than 30 days after appointment of a conservator under Section 411, the court shall give to the individual subject to conservatorship, the conservator, and any other person entitled to notice under Section 411(e) a statement of the rights of the individual subject to conservatorship and procedures to seek relief if the individual is denied those rights. The statement must be in plain language, in at least 16-point font, and to the extent feasible, in a

language in which the individual subject to conservatorship is proficient. The statement must notify the individual subject to conservatorship of the right to:

(1) seek termination or modification of the conservatorship, or removal of the conservator, and choose an attorney to represent the individual in these matters;

(2) participate in decision making to the extent reasonably feasible;

(3) receive a copy of the conservator's plan under Section 419, the conservator's inventory under Section 420, and the conservator's report under Section 423; and

(4) object to the conservator's inventory, plan, or report.

(c) If a conservator is appointed for the reasons stated in Section 401(b)(1)(B) and the individual subject to conservatorship is missing, notice under this section to the individual is not required.

Comment

This section, which is new to the act, is designed to ensure that the conservator, the individual subject to conservatorship, and family members and friends identified by the court, understand the appointment and the most important rights of the individual subject to conservatorship. The provisions help conservators to better understand their roles, thus reducing the risk of conservators acting inappropriately. They also increase transparency, help set reasonable expectations, and facilitate monitoring of the conservatorship by the individual, to the extent he or she is able, and by family and friends.

Subsection (a) requires a conservator to give to the individual subject to conservatorship and all persons entitled to notice of the original petition, a copy of the order of appointment as well as notice of the right to request termination or modification of the conservatorship. This notice must be given within 14 days after the appointment.

Subsection (b) requires the court not later than 30 days after the appointment to give notice of key rights to the individual subject to conservatorship, to the conservator, and to other persons whom the court stated in its order of appointment were entitled to notice under Section 411(e). Providing notice of key rights is new to the act. It was added so that individuals subject to guardianship and their families are in a better position to act on their rights. Among the key rights are the right to seek termination or modification of the conservatorship (Section 431); the right to petition for the conservator's removal (Section 430); the right to participate in decision making to the extent reasonably feasible (Section 418); and the right to receive and object to a conservator's plan (Section 419), inventory (Section 420), and report (Section 423).

Subsection (c) excuses notice to the individual subject to conservatorship in cases in which the individual is missing and a conservator was appointed because the adult was missing, detained, or unable to return to the United States.

SECTION 413. EMERGENCY CONSERVATOR.

(a) On its own or on petition by a person interested in an individual's welfare after a petition has been filed under Section 402, the court may appoint an emergency conservator for the individual if the court finds:

(1) appointment of an emergency conservator is likely to prevent substantial and irreparable harm to the individual's property or financial interests;

(2) no other person appears to have authority and willingness to act in the circumstances; and

(3) there is reason to believe that a basis for appointment of a conservator under Section 401 exists.

(b) The duration of authority of an emergency conservator may not exceed [60] days and the emergency conservator may exercise only the powers specified in the order of appointment. The emergency conservator's authority may be extended once for not more than [60] days if the court finds that the conditions for appointment of an emergency conservator under subsection (a) continue.

(c) Immediately on filing of a petition for an emergency conservator, the court shall appoint an attorney to represent the respondent in the proceeding. Except as otherwise provided in subsection (d), reasonable notice of the date, time, and place of a hearing on the petition must be given to the respondent, the respondent's attorney, and any other person the court determines.

(d) The court may appoint an emergency conservator without notice to the respondent and any attorney for the respondent only if the court finds from an affidavit or testimony that the

respondent's property or financial interests will be substantially and irreparably harmed before a hearing with notice on the appointment can be held. If the court appoints an emergency conservator without giving notice under subsection (c), the court must give notice of the appointment not later than 48 hours after the appointment to:

(1) the respondent;

(2) the respondent's attorney; and

(3) any other person the court determines.

(e) Not later than [five] days after the appointment, the court shall hold a hearing on the appropriateness of the appointment.

(f) Appointment of an emergency conservator under this section is not a determination that a basis exists for appointment of a conservator under Section 401.

(g) The court may remove an emergency conservator appointed under this section at any time. The emergency conservator shall make any report the court requires.

Comment

This section provides for the short-term appointment of an emergency conservator. The purpose of the section is to provide an expeditious means for the court to immediately protect an individual in urgent need of such protection. This section is new to this act. The 1997 act made no provision for the appointment of an emergency conservator.

Appointment of an emergency conservator is in order only when three conditions are met. First, there needs to be no one else willing or with authority to act to meet the individual's need. Second, the court must find that appointment of an emergency conservator is likely to prevent substantial and irreparable harm to the individual's property or financial interests. Thus, appointment of an emergency conservator is not proper where there is not an urgent need for such an appointment. Third, the court must have reason to believe that there is a basis to appoint a conservator under Section 401. Thus, the circumstances under which an emergency conservator can be appointed for a minor differ from those in which one can be appointed for an adult because Section 401 contains separate standards for appointment of a conservator for a minor and for an adult. In the case of an adult, an emergency conservator cannot be appointed where all indications are that the adult has the ability to receive and evaluate information and make and communicate decisions. In such circumstances, the court would not have reason to believe that the basis for appointment of a conservator for the adult under Section 401 exists.

Appointment of an emergency conservator represents a significant deprivation of liberty. As such, subsection (c) requires appointment of counsel for the respondent. Counsel for the respondent, consistent with the provisions of Section 406, should advocate for the respondent's wishes to the extent reasonably ascertainable. If counsel cannot reasonably ascertain those wishes, then counsel should advocate for a result that is least restrictive in type, duration, and scope, consistent with the respondent's interests. In some cases, this might mean advocating for a protective arrangement instead of conservatorship under Article 5.

Emergency conservators may only be empowered to act for a limited time. Subsection (b) specifies a maximum duration of 60 days although this time limit is placed in brackets to signal that enacting jurisdictions are free to adjust the period. This 60-day limit is designed to protect the due process rights of the respondent, as this section allows appointment of an emergency conservator without the full process otherwise required.

Subsection (d) authorizes the appointment of an emergency conservator without notice to the respondent only under compelling circumstances. Appointment of an emergency conservator without notice to the respondent should be a very rare occurrence. An emergency conservator may only be appointed without prior notice when there is testimony that the respondent's property or financial interests would be substantially and irreparably harmed before the hearing on the appointment with notice could be held. In such case, notice must be given within 48 hours. A hearing must then be held within five days after the appointment, or such number of days selected by the enacting state that the enacting state selects. States enacting this act should look at their requirements for an *ex parte* hearing and determine whether to adopt the time limit contained in this subsection or whether to impose different time limits. Five days appears to be the most common time period for a return hearing following an *ex parte* appointment. If the enacting state uses a different time period for a hearing following an *ex parte* appointment of a conservator, the time period used should be relatively short.

Unless stated to the contrary in this section, other sections of this act applicable to conservators generally apply to an emergency conservator appointed under this section, including the provisions relating to the duties of conservators.

SECTION 414. POWERS OF CONSERVATOR REQUIRING COURT APPROVAL.

(a) Except as otherwise ordered by the court, a conservator must give notice to persons entitled to notice under Section 403(d) and receive specific authorization by the court before the conservator may exercise with respect to the conservatorship the power to:

(1) make a gift, except a gift of de minimis value;

(2) sell, encumber an interest in, or surrender a lease to the primary dwelling of

the individual subject to conservatorship;

(3) convey, release, or disclaim a contingent or expectant interest in property, including marital property and any right of survivorship incident to joint tenancy or tenancy by the entireties;

(4) exercise or release a power of appointment;

(5) create a revocable or irrevocable trust of property of the conservatorship estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the individual subject to conservatorship;

(6) exercise a right to elect an option or change a beneficiary under an insurance policy or annuity or surrender the policy or annuity for its cash value;

(7) exercise a right to an elective share in the estate of a deceased spouse [or domestic partner] of the individual subject to conservatorship or renounce or disclaim a property interest; [and]

(8) grant a creditor priority for payment over creditors of the same or higher class if the creditor is providing property or services used to meet the basic living and care needs of the individual subject to conservatorship and preferential treatment otherwise would be impermissible under Section 428(e)[; and

(9) make, modify, amend, or revoke the will of the individual subject to conservatorship in compliance with [the state's statute for executing a will]].

(b) In approving a conservator's exercise of a power listed in subsection (a), the court shall consider primarily the decision the individual subject to conservatorship would make if able, to the extent the decision can be ascertained.

(c) To determine under subsection (b) the decision the individual subject to

conservatorship would make if able, the court shall consider the individual's prior or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the conservator. The court also shall consider:

(1) the financial needs of the individual subject to conservatorship and individuals who are in fact dependent on the individual subject to conservatorship for support, and the interests of creditors of the individual;

(2) possible reduction of income, estate, inheritance, or other tax liabilities;

(3) eligibility for governmental assistance;

(4) the previous pattern of giving or level of support provided by the individual;

(5) any existing estate plan or lack of estate plan of the individual;

(6) the life expectancy of the individual and the probability the conservatorship will terminate before the individual's death; and

(7) any other relevant factor.

(d) A conservator may not revoke or amend a power of attorney for finances executed by the individual subject to conservatorship. If a power of attorney for finances is in effect, a decision of the agent takes precedence over that of the conservator, unless the court orders otherwise.

Legislative Note: *Language in subsection (a)(9) is bracketed to allow an enacting state to reference its statute on will execution.*

Comment

This section, which is similar to Section 411 of the 1997 act lists actions for which a conservator must obtain prior court approval. The actions listed in the comparable provision of the 1997 act all related to the individual's estate plan.

This section adds two non-estate planning actions requiring court approval that were not part of the 1997 act. First, subsection (a)(2) requires court approval to "sell, encumber an interest in, or surrender a lease to the primary dwelling of the individual subject to conservatorship." This

provision is a corollary to Section 314(e)(6), which prohibits a guardian from surrendering a lease to or selling the individual's primary residence unless the proposed action was included in the guardian's plan; the court authorized the action by specific order; or at least 14 days advance notice was given to the persons listed under Section 310(e) and no objection has been filed.

Second, subsection (a)(8) permits a court to grant a creditor who has provided basic living expenses a higher priority for payment from an insolvent estate than would otherwise apply. Under Section 428(d), such a creditor would ordinarily have a fifth priority claim. Before paying such a higher priority claim, however, the conservator should be cautioned that the higher priority provided does not alter creditor priority stated in federal bankruptcy law or the Internal Revenue Code.

The estate planning powers listed in subsection (a) are all carried over from Section 411 of the 1997 act. However, under subsection (a)(1) of this section, court approval is not required for a gift of *de minimis* value, only for larger gifts. The act does not try to draw the line on what is and what is not a "*de minimis*" gift. Under Sections 411(a) and 427(b) of the 1997 act the line had been drawn at 20% of the estate income.

Subsection (a)(9), which provides that a conservator with court approval may make, modify, amend, or revoke the individual's will, is copied from Section 411(a)(7) and (b) of the 1997 act, which had in turn been taken from the California and South Dakota statutes. *See* Cal. Prob. Code Sections 2580, 6100.5(c), 6110(b); S.D. Codified Laws Ann. Section 29A-2-420(8). A place is provided in subsection (a)(9) for the enacting jurisdiction to insert the citation for its statute on the execution requirements for ordinary attested wills. Subsection (a)(9) follows the approach taken by the South Dakota statute, which is to contain the needed will execution authority within the conservatorship statutes. The other approach, followed by California, is to amend the statute on execution of wills to specifically allow execution by a conservator.

Pursuant to subsection (b), decisions by the conservator under this section must be based primarily on the decision that the individual subject to conservatorship would have made if able. Subsection (c) lists other factors the court is to consider with primacy given to the individual's personal values and expressed desires, past and present. In this regard, the act confirms what is likely already the law with respect to many of the transactions listed in this section. Even in the absence of a statute, the conservator should consider the individual's probable wishes when making decisions, particularly with respect to gifts and other estate planning related transactions. For the history of the judicially-created doctrine of substituted judgment and a sampling of representative cases, see Restatement (Third) of the Law of Trusts, § 11, Reporter's note to cmt. f (2003). The authority of a court to authorize a conservator to engage in estate planning related transactions with approval of the court is also expressly confirmed by statute in numerous states.

While not so limited, the authority confirmed by this section will often be used to minimize tax liabilities. For example, by making annual exclusion gifts, the federal estate tax liability at the protected person's death may be substantially reduced. Also quite valuable is the ability to seek court approval to amend the protected person's estate planning documents. For example, failures to meet the technical requirements for the federal estate tax marital or charitable deduction

sometimes may be corrected through a judicially-approved amendment of the relevant will or trust document.

This section can also be used for a non-tax transaction to qualify for governmental benefits, or the court may authorize the conservator to continue the individual's prior pattern of giving to charities and others. For smaller donors, such gifts would typically fit within the exception for "*de minimis*" gifts in subsection (a)(1) which do not require court approval.

Under subsection (d), a conservator may not revoke or amend the individual's power of attorney for finances. Furthermore, if a durable power of attorney is in effect, the decision of the agent takes precedence over that of the conservator, absent a court order to the contrary. However, the court always has authority to revoke the power of attorney in an appropriate case. The purpose of this provision is to make certain that the court is aware of the power of attorney and only the court has determined that it is appropriate to revoke or amend the power. To make certain that the court is aware of the power of attorney, Section 402(b)(3)(H) requires that the petition for the appointment of a conservatorship list the name and address of any agent, if known. Also, Section 403(c) includes the agent among the persons who must be given notice of the petition.

The persons who must be given notice of hearing on a petition under this section are as determined under Section 403(d), which prescribes the notice requirements for petitions for orders subsequent to the appointment of a conservator. Notice of the hearing, together with a copy of the petition, must be given to the individual subject to conservatorship, if the individual has attained 12 years of age and is not missing, detained, or unable to return to the United States. Notice must also be given to the conservator and to any other person the court determines.

SECTION 415. PETITION FOR ORDER AFTER APPOINTMENT. An individual subject to conservatorship or a person interested in the welfare of the individual may petition for an order:

(1) requiring the conservator to furnish a bond or collateral or additional bond or collateral or allowing a reduction in a bond or collateral previously furnished;

(2) requiring an accounting for the administration of the conservatorship estate;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator;

(5) modifying the type of appointment or powers granted to the conservator, if the extent of protection or management previously granted is excessive or insufficient to meet the individual's needs, including because the individual's abilities or supports have changed;

(6) rejecting or modifying the conservator's plan under Section 419, the conservator's inventory under Section 420, or the conservator's report under Section 423; or

(7) granting other appropriate relief.

Comment

Once a conservator has been appointed, the court supervising the conservatorship will ordinarily act only following the request of some moving party. This section, which is similar to Section 414 of the 1997 act, lists six of the more common types of petitions, and then adds a paragraph (7), which allows for petitions for "other appropriate relief". The six common petitions are requests relating to bond, a demand for an accounting, a request for distribution, a petition to remove the conservator, a request to modify the type of appointment and give the conservator less or more powers, and a request for an order rejecting or modifying the conservator's plan, inventory, or report.

It is essential that the individual subject to conservatorship have the right to petition for appropriate relief, and this section so provides. It is also important that other persons with an interest in the individual's welfare have access to the courts, which this provision also provides.

While a limited conservatorship should be ordered at the time of the original appointment whenever feasible, limited appointments may also be made at a later date. Perhaps the possibility of a limited conservatorship was not adequately considered, or perhaps the individual's situation has improved to the point that a limited conservatorship is now realistic. Also, when a limited conservatorship is ordered in the first instance, it is sometimes necessary to grant the conservator additional powers or control over additional property. Paragraph (5) therefore authorizes petitions to increase or decrease the powers granted to the conservator or property subject to the conservatorship. Section 401(b) requires that a need for increased powers in an adult proceeding be proven by clear-and-convincing evidence.

SECTION 416. BOND; ALTERNATIVE ASSET-PROTECTION ARRANGEMENT.

(a) Except as otherwise provided in subsection (c), the court shall require a conservator to furnish a bond with a surety the court specifies, or require an alternative asset-protection arrangement, conditioned on faithful discharge of all duties of the conservator. The court may waive the requirement only if the court finds that a bond or other asset-protection arrangement is not necessary to protect the interests of the individual subject to conservatorship. Except as otherwise provided in subsection (c), the court may not waive the requirement if the conservator

is in the business of serving as a conservator and is being paid for the conservator's service.

(b) Unless the court directs otherwise, the bond required under this section must be in the amount of the aggregate capital value of the conservatorship estate, plus one year's estimated income, less the value of property deposited under an arrangement requiring a court order for its removal and real property the conservator lacks power to sell or convey without specific court authorization. The court, in place of surety on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

(c) [A regulated financial-service institution qualified to do trust business] in this state is not required to give a bond under this section.

***Legislative Note*:** *Each state enacting the act can insert in subsection (c) the particular term or terms used in the state or statutory reference for such an institution or, alternatively, use the language provided.*

Comment

Bond for a conservator is nearly always required under this act. The bond may be waived only if (1) the conservator is a financial institution with trust powers, (2) the court finds that a bond is not necessary to protect the interests of the individual, or (3) the court orders an alternate asset arrangement. This approach is a significant shift from Section 415 of the 1997 act under which bond was discretionary with the court. This change parallels a similar significant shift in the National Probate Court Standards. In Standard 3.3.14 of the 1993 edition, bond was discretionary with the court. By contrast, Standard 3.3.15 of the 2013 edition requires that a conservator post bond except in unusual circumstances.

One possible way to avoid bond is for the court to order the placement of the conservatorship estate into an asset protection arrangement. Subsection (b) provides examples, but not a complete list, of asset protection arrangements. Mentioned are the deposit of the estate assets in a financial institution requiring a court order for their removal and prohibiting the sale of the individual's real property without order of court. Such asset protection arrangements may be reasonable alternatives to bond where the expense associated with the bond is not justified in light of the circumstances of the case. This may include a situation where the conservator is an individual who is unable to economically obtain bond due to the individual's credit rating or other factors but who the court nevertheless believes is best suited to serve as conservator.

Subsection (b) specifies that bond, where required, must be in the amount of the capital value of the conservatorship estate plus one year's income, although the court can adjust the amount. "One year's income" refers to the anticipated income of the conservatorship estate. Ideally, the

bond should be in an amount adequate to guard against financial exploitation of the assets of the individual subject to conservatorship by the conservator, even in cases where a relative or friend is appointed as conservator. National Probate Court Standard 3.3.15 (2013) contains a useful list of factors that the court may wish to consult when setting bond. Factors mentioned are (1) the value of the estate and annual gross income and other receipts; (2) the extent to which the estate has been deposited under an asset protection arrangement, including requiring a court order for the sale of real estate and placement of estate funds in a restricted account with proof that the bank will enforce the restrictions; (3) the frequency of the conservator's required reporting; (4) the extent to which the income and receipts are payable directly to a facility responsible for the individual's care; (5) whether the conservator was appointed pursuant to a nomination that requested that bond be waived; (6) any information received through a background check; and (7) the financial responsibility of the proposed conservator.

Bond may be ordered either at the time of the original appointment or at any later time. The court may also increase or decrease bond at any time.

SECTION 417. TERMS AND REQUIREMENTS OF BOND.

(a) The following rules apply to the bond required under Section 416:

(1) Except as otherwise provided by the bond, the surety and the conservator are jointly and severally liable.

(2) By executing a bond provided by a conservator, the surety submits to the personal jurisdiction of the court that issued letters of office to the conservator in a proceeding relating to the duties of the conservator in which the surety is named as a party. Notice of the proceeding must be given to the surety at the address shown in the records of the court in which the bond is filed and any other address of the surety then known to the person required to provide the notice.

(3) On petition of a successor conservator or person affected by a breach of the obligation of the bond, a proceeding may be brought against the surety for breach of the obligation of the bond.

(4) A proceeding against the bond may be brought until liability under the bond is exhausted.

(b) A proceeding may not be brought under this section against a surety of a bond on a matter as to which a proceeding against the conservator is barred.

(c) If a bond under Section 416 is not renewed by the conservator, the surety or sureties immediately shall give notice to the court and the individual subject to conservatorship.

Comment

This section specifies various technical requirements that apply when bond is required. The cost of the bond is payable from the conservatorship estate. Subsection (c), which is new to the act, was copied from S.D. Codified Laws Ann. § 29A-5-111 (2017).

SECTION 418. DUTIES OF CONSERVATOR.

(a) A conservator is a fiduciary and has duties of prudence and loyalty to the individual subject to conservatorship.

(b) A conservator shall promote the self-determination of the individual subject to conservatorship and, to the extent feasible, encourage the individual to participate in decisions, act on the individual's own behalf, and develop or regain the capacity to manage the individual's personal affairs.

(c) In making a decision for an individual subject to conservatorship, the conservator shall make the decision the conservator reasonably believes the individual would make if able, unless doing so would fail to preserve the resources needed to maintain the individual's well-being and lifestyle or otherwise unreasonably harm or endanger the welfare or personal or financial interests of the individual. To determine the decision the individual would make if able, the conservator shall consider the individual's prior or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the conservator.

(d) If a conservator cannot make a decision under subsection (c) because the conservator does not know and cannot reasonably determine the decision the individual subject to

conservatorship probably would make if able, or the conservator reasonably believes the decision the individual would make would fail to preserve resources needed to maintain the individual's well-being and lifestyle or otherwise unreasonably harm or endanger the welfare or personal or financial interests of the individual, the conservator shall act in accordance with the best interest of the individual. In determining the best interest of the individual, the conservator shall consider:

(1) information received from professionals and persons that demonstrate sufficient interest in the welfare of the individual;

(2) other information the conservator believes the individual would have considered if the individual were able to act; and

(3) other factors a reasonable person in the circumstances of the individual would consider, including consequences for others.

(e) Except when inconsistent with the conservator's duties under subsections (a) through (d), a conservator shall invest and manage the conservatorship estate as a prudent investor would, by considering:

(1) the circumstances of the individual subject to conservatorship and the conservatorship estate;

(2) general economic conditions;

(3) the possible effect of inflation or deflation;

(4) the expected tax consequences of an investment decision or strategy;

(5) the role of each investment or course of action in relation to the conservatorship estate as a whole;

(6) the expected total return from income and appreciation of capital;

(7) the need for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) the special relationship or value, if any, of specific property to the individual subject to conservatorship.

(f) The propriety of a conservator's investment and management of the conservatorship estate is determined in light of the facts and circumstances existing when the conservator decides or acts and not by hindsight.

(g) A conservator shall make a reasonable effort to verify facts relevant to the investment and management of the conservatorship estate.

(h) A conservator that has special skills or expertise, or is named conservator in reliance on the conservator's representation of special skills or expertise, has a duty to use the special skills or expertise in carrying out the conservator's duties.

(i) In investing, selecting specific property for distribution, and invoking a power of revocation or withdrawal for the use or benefit of the individual subject to conservatorship, a conservator shall consider any estate plan of the individual known or reasonably ascertainable to the conservator and may examine the will or other donative, nominative, or appointive instrument of the individual.

(j) A conservator shall maintain insurance on the insurable real and personal property of the individual subject to conservatorship, unless the conservatorship estate lacks sufficient funds to pay for insurance or the court finds:

(1) the property lacks sufficient equity; or

(2) insuring the property would unreasonably dissipate the conservatorship estate or otherwise not be in the best interest of the individual.

(k) If a power of attorney for finances is in effect, a conservator shall cooperate with the agent to the extent feasible.

(*l*) A conservator has access to and authority over a digital asset of the individual subject to conservatorship to the extent provided by [the Revised Uniform Fiduciary Access to Digital Assets Act] or court order.

(m) A conservator for an adult shall notify the court if the condition of the adult has changed so that the adult is capable of exercising rights previously removed. The notice must be given immediately on learning of the change.

Comment

This section is a greatly expanded version of Section 418 of the 1997 act.

Notably, subsection (a) makes a significant change in the basic responsibilities of the conservator. Instead of providing that a conservator shall observe the standards of care applicable to trustees, as was the case under Section 418(a) of the 1997 act, subsection (a) makes clear that the conservator's obligations are not owed to the estate but are owed directly to the individual subject to conservatorship. Subsection (a), after reciting that a conservator is a fiduciary, continues by stating that the conservator has duties of prudence and loyalty running directly to the individual under conservatorship.

This emphasis on the individual under conservatorship is also evident in subsection (b). The role of the conservator is not merely to conserve assets. The conservator is also required to reach out to the individual subject to conservatorship and to make the individual a partner in decision making where feasible. To the extent feasible, the conservator is to encourage the individual to participate in decisions, act on the individual's own behalf, and develop or regain the capacity to manage the individual's own affairs. This is consistent with the act's philosophy that guardianship and conservatorship should be as unobtrusive as possible. Intrusion is minimized when the views of the individual subject to conservatorship are respected by the conservator.

Subsections (c) and (d) provide a clear decision-making standard for conservators and are broadly similar to the decision-making standard for guardians for adults in Section 313(d) and (e). Subsection (c) of this section instructs the conservator to use what is frequently referred to as "substituted judgment" – that is, to make the decision the individual subject to conservatorship would make if able. But the conservator may diverge from substituted judgment when necessary to preserve assets to assure the individual's well-being or where using substituted judgment would unreasonably harm or endanger the individual's welfare or personal or financial interests.

Subsection (d) provides a decision-making standard for conservators who lack sufficient information to use the substituted judgment standard in subsection (c). In such situations, the conservator is instructed to act in the individual's best interest and is given direction on what must be considered in order to determine the individual's best interest. The decision-making standards in subsections (c) and (d) follow in broad outline the recommendations of the Third National Guardianship Summit. *See* David M. English, *Amending the Uniform Guardianship and Protective Proceedings Act to Implement the Standards and Recommendations of the Third National Guardianship Summit*, 12 NAELA J. 33, 45-47 (2016).

While a conservator's role is not identical to that of a trustee, many principles of trust law are relevant to conservators. Section 418(a) of the 1997 act provided that a conservator must observe the standards of care applicable to trustees but this simple statement left open the issue whether that standard of care included only the basic obligation of prudence or whether it also included the many other duties of a trustee such as the duties listed in Article 8 of the Uniform Trust Code. This act is more selective, incorporating only those powers and duties that the drafting committee concluded were clearly applicable to conservators.

Subsections (e)-(h) list a number of duties based on trust law concepts, all of which are drawn from the widely enacted Uniform Prudent Investor Act, which was approved by the Uniform Law Commission in 1994. Subsection (e), which is copied from Section 2(c) of the Prudent Investor Act, requires the conservator to invest as a prudent investor and incorporates seven of the factors from the other act that are used to judge the investment decisions of a trustee. Subsection (e) also adds a requirement that the conservator consider the circumstances of the individual subject to conservatorship and the conservatorship estate.

Subsection (f) is copied from Section 8 of the Uniform Prudent Investor Act. It emphasizes that a conservator's actions as a prudent investor are to be judged at the time of the decision and not by hindsight.

Subsection (g) is copied from Section 2(d) of the Uniform Prudent Investor Act. One aspect of a conservator's obligation to invest with prudence is a requirement that the conservator use reasonable efforts to verify facts relevant to the investment and management of the conservatorship estate.

Subsection (h) is copied from Section 2(f) of the Uniform Prudent Investor Act. It restates the well-known doctrine, based on trust law principles, that a conservator who either has special skills or expertise, or represents that he or she has special skills or expertise, has a duty to use those special skills or expertise. Such a conservator is therefore held to a higher standard but only for those tasks for which the conservator has special skills or expertise. As stated in the comment to Section 2 of the Uniform Prudent Investor Act:

> The prudent investor standard applies to a range of fiduciaries, from the most sophisticated professional investment management firms and corporate fiduciaries, to family members of minimal experience. Because the standard of prudence is relational, it follows that the standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs.

Subsection (i), which was copied from Section 418(d) of the 1997 act, but which is contrary to at least some case law, allows a conservator access to and the right to examine the will of the individual subject to conservatorship and other documents comprising the individual's estate plan. Such access is essential for the conservator to carry out the obligation, stated in subsection (c), to give substantial weight to the preferences of the individual under conservatorship when making decisions. For example, by allowing the conservator access to the estate plan, the risk of inadvertent sales of specifically devised property and the difficult ademption problems such sales often create may be avoided. Access to the estate plan also facilitates, where appropriate, the filing of a petition with respect to the individual's estate plan as authorized by Section 414.

Although one might assume that the obligation to carry adequate insurance is fundamental to acting as a prudent conservator, the drafting committee concluded that some clarification would be helpful. Subsection (j) requires that a conservator maintain insurance on the insurable real and personal property unless the conservatorship estate lacks sufficient funds or the court concludes that the property lacks sufficient equity or insuring the property would unreasonably dissipate the estate or otherwise not be in the individual's best interest.

Subsection (k) requires a conservator to cooperate with the agent under any power of attorney for finances that may be in effect. Pursuant to Section 414, however, the decision of the agent takes precedence over that of the conservator unless the court orders otherwise. If the power of attorney is brought to the court's attention during the appointment process and the court concludes that the power of attorney is valid and the agent is acting appropriately under it, the court should not normally appoint a conservator unless the agent's authority is inadequate for some reason. If the court concludes that the agent under the power of attorney is unable to satisfactorily perform the agent's functions due to abuse by the agent or for other reason, an appropriate course of action is for the court to terminate the power of attorney.

While the appointment of a conservator normally gives the conservator the automatic rights to take control of the assets under conservatorship, access to digital assets such as social media accounts, is often restricted by terms-of-service agreements (TOSA). Typically, TOSA will deny access to anyone other the owner, even a conservator or personal representative acting for the owner. The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which was approved by the Uniform Law Commission in 2015 and has been enacted in over 40 states as of June 2018, grants a conservator access to such assets. Under Section 14 of that other act, which this act incorporates by reference in subsection (*l*), a conservator may access digital assets if expressly authorized by the court. Obtaining such specific orders upon opening of a conservatorship should become standard practice.

Finally, in furtherance of the concepts of limited conservatorship and least restrictive alternatives, subsection (m) obligates the conservator to immediately notify the court when the condition of an adult subject to conservatorship has sufficiently changed so that the adult is capable of exercising rights previously removed. The conservator should not wait until the next reporting period to inform the court.

SECTION 419. CONSERVATOR'S PLAN.

(a) A conservator, not later than 60 days after appointment and when there is a significant change in circumstances or the conservator seeks to deviate significantly from the conservator's plan, shall file with the court a plan for protecting, managing, expending, and distributing the assets of the conservatorship estate. The plan must be based on the needs of the individual subject to conservatorship and take into account the best interest of the individual as well as the individual's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the conservator. The conservator shall include in the plan:

(1) a budget containing projected expenses and resources, including an estimate of the total amount of fees the conservator anticipates charging per year and a statement or list of the amount the conservator proposes to charge for each service the conservator anticipates providing to the individual;

(2) how the conservator will involve the individual in decisions about management of the conservatorship estate;

(3) any step the conservator plans to take to develop or restore the ability of the individual to manage the conservatorship estate; and

(4) an estimate of the duration of the conservatorship.

(b) A conservator shall give notice of the filing of the conservator's plan under subsection (a), together with a copy of the plan, to the individual subject to conservatorship, a person entitled to notice under Section 411(e) or a subsequent order, and any other person the court determines. The notice must include a statement of the right to object to the plan and be given not later than 14 days after the filing.

(c) An individual subject to conservatorship and any person entitled under subsection (b)

to receive notice and a copy of the conservator's plan may object to the plan.

(d) The court shall review the conservator's plan filed under subsection (a) and determine whether to approve the plan or require a new plan. In deciding whether to approve the plan, the court shall consider an objection under subsection (c) and whether the plan is consistent with the conservator's duties and powers. The court may not approve the plan until [30] days after its filing.

(e) After a conservator's plan under this section is approved by the court, the conservator shall provide a copy of the plan to the individual subject to conservatorship, a person entitled to notice under Section 411(e) or a subsequent order, and any other person the court determines.

Comment

This section is an expansion of Section 418(c) of the 1997 act, which required that the conservator file a plan but did not provide much detail on what the plan should contain. The requirement that the conservator file a plan is consistent with National Probate Court Standard 3.3.16 (2013), and with Third Summit Guardianship Summit Recommendation 1.1. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1192 (2012).

The plan serves as a tool for the conservator to manage the estate in accordance with the conservator's duties under the act. The existence of the plan also allows for more meaningful monitoring of the conservator as the court and others can hold a conservator accountable for compliance with the plan. The conservator's plan also plays an important role in avoiding subsequent problems. It allows the court, the individuals subject to conservatorship, and other persons who have received the plan to identify potential problems. From the conservator's perspective, this can be advantageous as well, creating a mechanism to alert the conservator to objections in advance of action, at a time when the conservator can still change course.

Subsection (a) requires that the conservator file a plan with the court within 60 days after appointment, whenever there is a significant change of circumstances, or if the conservator seeks to deviate significantly from the plan currently on file. In addition to plans for expenditures, investments, and distributions, the plan must list the steps that will be taken to develop or restore the individual's ability to manage the person's property and an estimate of the duration of the conservatorship. The plan must take into account the individual's preferences, values, and prior directions to the extent known to or reasonably ascertainable to the conservator in addition to the individual's best interest.

Under subsection (a)(1), one topic that must be addressed in the plan is the amount the

conservator proposes to charge for each service the conservator anticipates providing to the adult. While earlier disclosure of the proposed fees is not required, best practice will typically be to disclose fees even before crafting the plan. For example, it is helpful for the court to have a sense of the likely fees in determining whether or not to make the appointment.
While a conservator need not request a hearing on the plan, subsection (b) requires that the conservator, within 14 days after its filing, give notice of the filing of the plan to the individual subject to conservatorship, to a person entitled to notice under Section 411(e), and to any other person the court directs. The notice must include a statement of the right to object to the plan, a right which is granted in subsection (c). Should those notified object or have other concerns about the plan, a hearing on the plan may be requested pursuant to Section 415.

Subsection (d) requires the court to review the conservator's plan, whether it is a new plan or a revision, and to determine whether or not to approve it. In order to ensure that those receiving copies of the plan have sufficient time to object, the court may not approve the plan until 30 days after it was filed. The court is not required to approve the plan but implementing a system for monitoring the plan, similar to the system for monitoring the annual report required by Section 423(e), will help assure that the conservator is properly discharging the conservator's duties. If there are concerns, the court can direct the conservator to revise the plan or take other appropriate action, including appointing a visitor under Section 423(c) to review the plan. A court should not approve a plan if it is inconsistent with the conservator's duties or powers, or without seriously considering any objections made to it.

Finally, subsection (e) requires the conservator to provide any plan approved by the court to the adult subject to guardianship, to persons entitled to notice under the terms of the order appointing the guardian, and to anyone else the court has determined is entitled to notice.

SECTION 420. INVENTORY; RECORDS.

(a) Not later than 60 days after appointment, a conservator shall prepare and file with the appointing court a detailed inventory of the conservatorship estate, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(b) A conservator shall give notice of the filing of an inventory to the individual subject to conservatorship, a person entitled to notice under Section 411(e) or a subsequent order, and any other person the court determines. The notice must be given not later than 14 days after the filing.

(c) A conservator shall keep records of the administration of the conservatorship estate

and make them available for examination on reasonable request of the individual subject to conservatorship, a guardian for the individual, or any other person the conservator or the court determines.

Comment

This section is similar to Section 419 of the 1997 act except that the notice provisions now found in this section were formerly included in a different section of that act. Subsection (b) of this section requires that the conservator give notice of the filing of the inventory to the individual subject to conservatorship, to persons entitled to notice under Section 411(e), and to any other person the court determines. The 60-day filing deadline for the inventory is the same as for the filing of the conservatorship plan required by Section 419. While technically separate documents, the conservatorship plan and inventory should ideally be prepared in tandem, with the inventory providing backup data for the course of action recommended in the conservatorship plan.

An inventory should list the complete assets of the conservatorship estate, not merely those with significant monetary value. Documenting tangible personal property included in the conservatorship estate, especially items of particular sentimental value to the individual subject to conservatorship or the individual's family, helps ensure that personal items of importance to the individual are properly managed.

SECTION 421. ADMINISTRATIVE POWERS OF CONSERVATOR NOT REQUIRING COURT APPROVAL.

(a) Except as otherwise provided in Section 414 or qualified or limited in the court's order of appointment and stated in the letters of office, a conservator has all powers granted in this section and any additional power granted to a trustee by law of this state other than this [act].

(b) A conservator, acting reasonably and consistent with the fiduciary duties of the conservator to accomplish the purpose of the conservatorship, without specific court authorization or confirmation, may with respect to the conservatorship estate:

(1) collect, hold, and retain property, including property in which the conservator has a personal interest and real property in another state, until the conservator determines disposition of the property should be made;

(2) receive additions to the conservatorship estate;

(3) continue or participate in the operation of a business or other enterprise;

(4) acquire an undivided interest in property in which the conservator, in a fiduciary capacity, holds an undivided interest;

(5) invest assets;

(6) deposit funds or other property in a financial institution, including one operated by the conservator;

(7) acquire or dispose of property, including real property in another state, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon property;

(8) make ordinary or extraordinary repairs or alterations in a building or other structure, demolish any improvement, or raze an existing or erect a new party wall or building;

(9) subdivide or develop land, dedicate land to public use, make or obtain the vacation of a plat and adjust a boundary, adjust a difference in valuation of land, exchange or partition land by giving or receiving consideration, and dedicate an easement to public use without consideration;

(10) enter for any purpose into a lease of property as lessor or lessee, with or without an option to purchase or renew, for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or a pooling or unitization agreement;

(12) grant an option involving disposition of property or accept or exercise an option for the acquisition of property;

(13) vote a security, in person or by general or limited proxy;

(14) pay a call, assessment, or other sum chargeable or accruing against or on account of a security;

(15) sell or exercise a stock subscription or conversion right;

(16) consent, directly or through a committee or agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(17) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;

(18) insure:

(A) the conservatorship estate, in whole or in part, against damage or loss in accordance with Section 418(j); and

(B) the conservator against liability with respect to a third person;

(19) borrow funds, with or without security, to be repaid from the conservatorship estate or otherwise;

(20) advance funds for the protection of the conservatorship estate or the individual subject to conservatorship and all expenses, losses, and liability sustained in the administration of the conservatorship estate or because of holding any property for which the conservator has a lien on the conservatorship estate;

(21) pay or contest a claim, settle a claim by or against the conservatorship estate or the individual subject to conservatorship by compromise, arbitration, or otherwise, or release, in whole or in part, a claim belonging to the conservatorship estate to the extent the claim is uncollectible;

(22) pay a tax, assessment, compensation of the conservator or any guardian, and

other expense incurred in the collection, care, administration, and protection of the conservatorship estate;

(23) pay a sum distributable to the individual subject to conservatorship or an individual who is in fact dependent on the individual subject to conservatorship by paying the sum to the distributee or for the use of the distributee:

(A) to the guardian for the distributee;

(B) to the custodian of the distributee under [the Uniform Transfers to Minors Act] or custodial trustee under [the Uniform Custodial Trust Act]; or

(C) if there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;

(24) bring or defend an action, claim, or proceeding in any jurisdiction for the protection of the conservatorship estate or the conservator in the performance of the conservator's duties;

(25) structure the finances of the individual subject to conservatorship to establish eligibility for a public benefit, including by making gifts consistent with the individual's preferences, values, and prior directions, if the conservator's action does not jeopardize the individual's welfare and otherwise is consistent with the conservator's duties; and

(26) execute and deliver any instrument that will accomplish or facilitate the exercise of a power of the conservator.

Comment

This section is similar to Section 425 of the 1997 act. One significant addition is subsection (b)(25) which grants the conservator authority to structure the finances of the individual subject to conservatorship in order to establish eligibility for a public benefit. Another significant change was the revision of subsection (a) to clarify that the specific powers listed in subsection (b) are subject to the requirement that certain actions must be approved by the court as provided

in Section 414 and the authority of the conservator may be limited as stated in the order of appointment or letters of office.

This section lists administrative powers that a conservator may exercise. Because of the reluctance of some third parties to accept the authority of a fiduciary without evidence that the fiduciary has authority to exercise the specific power in question, it is customary for a fiduciary powers list to be lengthy in an effort to catalog every type of transaction the fiduciary might need to carry out.

While this section is primarily based on Section 425 of the 1997 act, the specific wording of that section was strongly influenced by Section 3-715 of the Uniform Probate Code, which lists the powers of a personal representative of a decedent's estate. In drafting this section, Section 816 of the 2000 Uniform Trust Code (UTC) was also consulted. The comments to UTC Section 816 contain detailed explanations of the specific administrative powers of a trustee. Because many of the powers listed in UTC Section 816 are identical to the powers listed in this section, the comments to UTC Section 816 are a useful resource for understanding the powers listed in this section.

Certain of the powers listed in subsection (b) can only be fully understood by reference to other parts of the act. Subsection (b)(5), which authorizes the conservator to invest assets, must be read in conjunction with the specific duties relating to investment that are listed in Section 418. In addition, subsection (b)(18) requires that the conservator insure the conservatorship estate against damage or loss in accordance with Section 418(j). More broadly, and as specified in the lead-in language to subsection (b), all of the powers listed in this section must be exercised in a manner consistent with the conservator's fiduciary duties and the purpose of the conservatorship.

This section lists the administrative powers of a conservator. The powers of a conservator with respect to distribution are listed in Section 422. The power of a conservator to deal with digital property is controlled by the Revised Uniform Fiduciary Access to Digital Assets Act, which requires that the conservator obtain specific court authorization. *See* Section 418(l) and accompanying comment.

SECTION 422. DISTRIBUTION FROM CONSERVATORSHIP ESTATE. Except as otherwise provided in Section 414 or qualified or limited in the court's order of appointment and stated in the letters of office, and unless contrary to a conservator's plan under Section 419, the conservator may expend or distribute income or principal of the conservatorship estate without specific court authorization or confirmation for the support, care, education, health, or welfare of the individual subject to conservatorship or an individual who is in fact dependent on the individual subject to conservatorship, including the payment of child or spousal support, in

accordance with the following rules:

(1) The conservator shall consider a recommendation relating to the appropriate standard of support, care, education, health, or welfare for the individual subject to conservatorship or individual who is dependent on the individual subject to conservatorship, made by a guardian for the individual subject to conservatorship, if any, and, if the individual subject to conservatorship is a minor, a recommendation made by a parent of the minor.

(2) The conservator acting in compliance with the conservator's duties under Section 418 is not liable for an expenditure or distribution made based on a recommendation under paragraph (1) unless the conservator knows the expenditure or distribution is not in the best interest of the individual subject to conservatorship.

(3) In making an expenditure or distribution under this section, the conservator shall consider:

(A) the size of the conservatorship estate, the estimated duration of the conservatorship, and the likelihood the individual subject to conservatorship, at some future time, may be fully self-sufficient and able to manage the individual's financial affairs and the conservatorship estate;

(B) the accustomed standard of living of the individual subject to conservatorship and individual who is dependent on the individual subject to conservatorship;

(C) other funds or source used for the support of the individual subject to conservatorship; and

(D) the preferences, values, and prior directions of the individual subject to conservatorship.

(4) Funds expended or distributed under this section may be paid by the conservator to

any person, including the individual subject to conservatorship, as reimbursement for expenditures the conservator might have made, or in advance for services to be provided to the individual subject to conservatorship or individual who is dependent on the individual subject to conservatorship if it is reasonable to expect the services will be performed and advance payment is customary or reasonably necessary under the circumstances.

Comment

This section, which sets forth a conservator's specific duties and powers with respect to ongoing distributions, is a revision of Section 427 of the 1997 act. Distributions upon termination of the conservatorship are addressed in Section 431. Additional rules with respect to a termination due to the death of the individual subject to conservatorship are covered in Section 427 of this act.

Distributions under this section may be made without court authorization or confirmation. The principal change from the 1997 act is to eliminate the provision authorizing a conservator to make gifts from the individual's estate of up to 20 percent of the estate's annual income without prior approval of the court. Under Section 414(a)(1) of this act, the 20 percent limit has been changed to an authority to make "*de minimis*" gifts.

This section authorizes the conservator to make distributions for the support of the individual subject to conservatorship or any other individual who is in fact dependent on the individual subject to conservatorship. "Dependents" within the meaning of this section and elsewhere in the act includes individuals who are in fact dependent on the individual subject to conservatorship, as is common with children in college and adult children with developmental disabilities. The conservator is also expressly authorized to pay child or spousal support.

The four numbered paragraphs in the section establish certain standards for the making of distributions. Paragraph (1) requires that the conservator consider recommendations from the guardian, if any and, in the case of a minor, a recommendation by a parent. Under paragraph (2), a conservator may rely on such a recommendation without liability unless the conservator knows the expenditure or distribution is not in the best interest of the individual subject to conservatorship. Paragraph (3) specifies various factors that the conservator must consider when making expenditures or distributions. These include not only traditional factors such as the size of the conservatorship estate, the expected duration of the conservatorship, and other resources, such as government benefits, which may be available for support, but also the preferences, values, and prior directions of the individual subject to conservatorship. Paragraph (4) provides that the conservator may make payments in advance for services to be provided to the individual and can also reimburse for expenditures already made, including reimbursement of the individual subject to conservatorship.

SECTION 423. CONSERVATOR'S REPORT AND ACCOUNTING; MONITORING.

(a) A conservator shall file with the court a report in a record regarding the administration of the conservatorship estate annually unless the court otherwise directs, on resignation or removal, on termination of the conservatorship, and at any other time the court directs.

(b) A report under subsection (a) must state or contain:

(1) an accounting that lists property included in the conservatorship estate and the receipts, disbursements, liabilities, and distributions during the period for which the report is made;

(2) a list of the services provided to the individual subject to conservatorship;

(3) a copy of the conservator's most recently approved plan and a statement whether the conservator has deviated from the plan and, if so, how the conservator has deviated and why;

(4) a recommendation as to the need for continued conservatorship and any recommended change in the scope of the conservatorship;

(5) to the extent feasible, a copy of the most recent reasonably available financial statements evidencing the status of bank accounts, investment accounts, and mortgages or other debts of the individual subject to conservatorship with [all but the last four digits of the] account numbers and Social Security number redacted;

(6) anything of more than de minimis value which the conservator, any individual who resides with the conservator, or the spouse, [domestic partner,] parent, child, or sibling of the conservator has received from a person providing goods or services to the individual subject to conservatorship;

(7) any business relation the conservator has with a person the conservator has paid or that has benefited from the property of the individual subject to conservatorship; and

(8) whether any co-conservator or successor conservator appointed to serve when a designated event occurs is alive and able to serve.

(c) The court may appoint a [visitor] to review a report under this section or conservator's plan under Section 419, interview the individual subject to conservatorship or conservator, or investigate any other matter involving the conservatorship. In connection with the report, the court may order the conservator to submit the conservatorship estate to appropriate examination in a manner the court directs.

(d) Notice of the filing under this section of a conservator's report, together with a copy of the report, must be provided to the individual subject to conservatorship, a person entitled to notice under Section 411(e) or a subsequent order, and other persons the court determines. The notice and report must be given not later than 14 days after filing.

(e) The court shall establish procedures for monitoring a report submitted under this section and review each report at least annually to determine whether:

(1) the reports provide sufficient information to establish the conservator has complied with the conservator's duties;

(2) the conservatorship should continue; and

(3) the conservator's requested fees, if any, should be approved.

(f) If the court determines there is reason to believe a conservator has not complied with the conservator's duties or the conservatorship should not continue, the court:

(1) shall notify the individual subject to conservatorship, the conservator, and any other person entitled to notice under Section 411(e) or a subsequent order;

(2) may require additional information from the conservator;

(3) may appoint a [visitor] to interview the individual subject to conservatorship or conservator or investigate any matter involving the conservatorship; and

(4) consistent with Sections 430 and 431, may hold a hearing to consider removal of the conservator, termination of the conservatorship, or a change in the powers granted to the conservator or terms of the conservatorship.

(g) If the court has reason to believe fees requested by a conservator are not reasonable, the court shall hold a hearing to determine whether to adjust the requested fees.

(h) A conservator may petition the court for approval of a report filed under this section. The court after review may approve the report. If the court approves the report, there is a rebuttable presumption the report is accurate as to a matter adequately disclosed in the report.

(i) An order, after notice and hearing, approving an interim report of a conservator filed under this Section adjudicates liabilities concerning a matter adequately disclosed in the report, as to a person given notice of the report or accounting.

(j) An order, after notice and hearing, approving a final report filed under this Section discharges the conservator from all liabilities, claims, and causes of action by a person given notice of the report and the hearing as to a matter adequately disclosed in the report.

Legislative Note: *The brackets in subsection (b) are included so that an enacting state may make a policy choice as to whether to require full or partial redaction of Social Security numbers and account numbers.*

The term "visitor" is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.

Comment

This section is an expansion of Section 420 of the 1997 act. This section requires a conservator to periodically file a report regarding the administration of the conservatorship. As set forth in subsection (a), the report must be filed on or about the anniversary of the conservator's

appointment, with subsequent reports due annually thereafter. Reports must also be filed on the conservator's resignation or removal and upon termination of the conservatorship.

Subsection (b) lists the required contents of the report. The list has been expanded from that in Section 420(b) of the 1997 act to provide the court with more comprehensive and useful information about the needs of the individual subject to conservatorship and the conservator's performance. The 1997 act required that the conservator file an accounting listing the assets under the conservator's control and the receipts, disbursements, and distributions made during the reporting period. The report was also required to include a list of the services provided to the individual and any recommended changes in the conservatorship plan, the scope of the conservatorship, as well as a recommendation on the continued need for conservatorship.

In addition to continuing the requirements in the 1997 act, this act adds several additional requirements. First, to verify that the conservator has followed the conservatorship plan, subsection (b)(3) requires that the conservator, in addition to including a copy of the most recently approved conservator plan, state whether the conservator has deviated from the plan and, if so, why. Second, to enable the court to verify the financial data included in the report, subsection (b)(5) requires the conservator file copies of relevant financial statements supporting the entries in the account. The filing of such supporting documentation is already required in many jurisdictions as a matter of probate rule or local probate practice. Third, to allow the court to address any issues involving conflict of interest, subsection (b)(6) requires that the report state whether the conservator or a member of the conservator's family has received anything of more than *de minimis* value from a person providing goods or services to the individual subject to conservatorship. In addition, pursuant to subsection (b)(7), the conservator must disclose any business relation the conservator has with a person the conservator has paid or who has benefitted from property of the individual subject to conservatorship. Finally, to facilitate the advance appointment of co-conservators or successor conservators as authorized by Sections 110 and 111, subsection (b)(8) requires that the report state whether any co-conservator or successor conservator appointed to take office when a designated event occurs is still alive and able to serve.

Subsection (c) authorizes the court to appoint a visitor to review a report submitted under this section or the conservatorship plan filed under Section 419, interview the conservator or the individual, and investigate any other matter involving the conservatorship. The visitor can provide the court with additional information and context to understand the conservator's report and potential omissions in that report. The appointment of a visitor can form a vital part of the monitoring procedures required under subsection (e).

Subsection (d) requires the report, and notice of its filing, be given in a timely manner to the individual subject to conservatorship, any person entitled to such notice of the report by the terms of the original order appointing the guardian or a subsequent court order, and any other person the court determines. It thus works in tandem with Section 411(e) to increase the ability of interested individuals to monitor guardianships at minimal cost to the public. As explained in the comments to Section 411(e), such persons can act as extra sets of eyes and ears for the court to prevent or remedy abuse.

Subsection (e) requires the court to establish procedures for monitoring conservator's reports. Under this subsection, the court is required to review such reports at least annually to determine whether the conservator has complied with the conservator's duties, whether the conservatorship should continue, and whether any fees requested by the conservator should be approved. In performing this review, the court should carefully consider not only the report, but the supporting documentation and the adequacy of such supporting documentation. The establishment of a monitoring system was also required by Section 420(d) of the 1997 act although that provision lacked the depth of subsection (e) of this act.

An independent monitoring system is crucial for a court to adequately safeguard against abuses in conservatorship cases. Monitors can be paid court personnel, court appointees, or volunteers. Subsection (e) does not specify the procedures the court must use. The key is to develop an independent monitoring system that cannot only safeguard against obvious abuse and neglect, but also hold conservators accountable for their fiduciary duties. For guidance, courts are directed to National Probate Court Standards 3.3.17 (2013). Monitoring systems are also discussed in the National Association of Court Management Adult Guardianship Guide (2014), and the handbook, *Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community*, published by the American Bar Association Commission on Law and Aging in 2011.

Subsection (f) sets forth the next steps for courts that determine that there is reason to believe the conservator has not complied with the duties imposed by this act, or that the conservatorship should be modified or terminated. The court is required to act in response to this finding but is given significant discretion on how to proceed. In some cases, the best practice will be to move directly to holding a hearing. In others, the court may simply request additional information or appoint a visitor. Regardless of which approach it takes, however, the court must notify the individual subject to guardianship, the conservator, and any other person entitled to notice under Section 411(e) of the court's action or proposed action.

Subsection (g) requires a court with reason to believe the conservator's fees are unreasonable to hold a hearing to determine whether to adjust those fees. In considering the reasonableness of proposed fees, the court should consult Section 120 of this act, which lists factors the court is to consider in setting the conservator's compensation.

Subsection (h) permits a conservator for an adult to petition the court to approve a report filed under this section. A court must review the report before approval. If the court approves the report following a review, it creates a rebuttable presumption that the report is accurate as to any matter that was adequately disclosed.

Subsections (i) and (j) are new to the act but confirm the well-established doctrine that court approval of the conservator's interim and final reports is binding on persons given notice of the report as to all matters adequately disclosed in the report.

SECTION 424. ATTEMPTED TRANSFER OF PROPERTY BY INDIVIDUAL SUBJECT TO CONSERVATORSHIP.

(a) The interest of an individual subject to conservatorship in property included in the conservatorship estate is not transferrable or assignable by the individual and is not subject to levy, garnishment, or similar process for claims against the individual unless allowed under Section 428.

(b) If an individual subject to conservatorship enters into a contract after having the right to enter the contract removed by the court, the contract is void against the individual and the individual's property but is enforceable against the person that contracted with the individual.

(c) A person other than the conservator that deals with an individual subject to conservatorship with respect to property included in the conservatorship estate is entitled to protection provided by law of this state other than this [act].

Comment

This section is a partial enactment and revision of Section 422 of the 1997 act. This section creates a "spendthrift effect" for property included in the conservatorship estate. That is, the conservatorship property is neither transferable nor assignable by the individual subject to conservatorship and is not subject to levy, garnishment, or similar process for claims against the individual.

Subsection (b) addresses the enforcement of contracts entered into by the individual subject to conservatorship. If the ability of the individual to enter into a contract has been removed by the court, any contract entered into by the individual is void as against the individual and the individual's property but is enforceable against the other party at the election of the conservator. Subsection (c) makes clear, however, that the inability of the contracting party to enforce the contract against the individual or conservatorship estate does not preclude resort to other remedies that may be available such as a right to restitution or remedies under the statutes regulating commercial transactions.

SECTION 425. TRANSACTION INVOLVING CONFLICT OF INTEREST. A transaction involving a conservatorship estate which is affected by a substantial conflict between the conservator's fiduciary duties and personal interests is voidable unless the transaction is

authorized by court order after notice to persons entitled to notice under Section 411(e) or a subsequent order. A transaction affected by a substantial conflict includes a sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, an individual with whom the conservator resides, the spouse, [domestic partner,] descendant, sibling, agent, or attorney of the conservator, or a corporation or other enterprise in which the conservator has a substantial beneficial interest.

Comment

This section is similar to Section 423 of the 1997 act.

Transactions involving conservatorship assets entered into by the conservator or by persons with close business or personal ties to the conservator have the potential to be tainted by conflict of interest. Because of this serious risk, a transaction involving the conservatorship property entered into by the conservator or with persons having close ties to the conservator is voidable under this section without further proof. However, transactions involving conservatorship property with parties not on the list are not necessarily valid. A transaction involving other parties may still be voided if it is proven that a substantial conflict between personal and fiduciary interests exists and that the transaction was affected by the conflict.

The fact that the transaction is voidable does not extinguish any action for breach of fiduciary duty or for damages, separate and apart from voiding the transaction. The section intentionally does not provide any specific limitation of time on when an action to void the transaction must be brought. Rather, the limitations period for challenging the conservator's report on which the transaction was disclosed might apply.

Per Section 415, a petition to void a transaction may be filed either by the individual subject to conservatorship or by any person interested in the individual's welfare. Whether the court should grant or deny the petition will often depend on the financial impact on the conservatorship estate. Should the transaction have proven unprofitable to the conservator or related party, the court is more likely allow the transaction to stand.

Conservators considering entering into transactions that might implicate this section should consider obtaining prior court approval. Under this section, a transaction is not voidable if approved by the court following notice to interested persons.

Reference is made to Section 802 of the Uniform Trust Code (UTC) and related comments for additional information on conflicts of interest. However, under the UTC, a transaction entered into by the trustee with specified family members or business associates is only presumed to be tainted by a conflict of interest. Under this section, such a transaction that is entered into by a conservator is voidable without further proof.

SECTION 426. PROTECTION OF PERSON DEALING WITH CONSERVATOR.

(a) A person that assists or deals with a conservator in good faith and for value in any transaction, other than a transaction requiring a court order under Section 414, is protected as though the conservator properly exercised any power in question. Knowledge by a person that the person is dealing with a conservator alone does not require the person to inquire into the existence of authority of the conservator or the propriety of the conservator's exercise of authority, but restrictions on authority stated in letters of office, or otherwise provided by law, are effective as to the person. A person that pays or delivers property to a conservator is not responsible for proper application of the property.

(b) Protection under subsection (a) extends to a procedural irregularity or jurisdictional defect in the proceeding leading to the issuance of letters of office and does not substitute for protection for a person that assists or deals with a conservator provided by comparable provisions in law of this state other than this [act] relating to a commercial transaction or simplifying a transfer of securities by a fiduciary.

Comment

This section is similar to Section 424 of the 1997 act. The purpose of this section is to facilitate commercial transactions by negating the traditional duty of inquiry found under the common law of trusts. Even the third party's actual knowledge that the third party is dealing with a conservator does not require that the third party inquire into the possession of or propriety of the conservator's exercise of a power. Nor is the third party, contrary to the common law, responsible for the proper application of funds or property delivered to the conservator. But consistent with the emphasis of this act on limited conservatorship, the protection under this section that is extended to third parties is not unlimited. Third parties are charged with knowledge of restrictions on the authority of a conservator whether the restriction is specified in the letters of office or the restriction is one to which all conservators are subject under the law of the state. Pursuant to Section 108(c), any limitation on the assets subject to a conservatorship must be endorsed on the conservator's letters.

The protections provided by this section are of limited application. As provided in subsection (b), for many transactions, this section will be superseded by statutes relating to commercial transactions or transfers of securities by fiduciaries.

For background on Section 7 of the Uniform Trustees' Powers Act, upon which this section is ultimately based, see Jerome H. Curtis, Jr., *Transmogrification of the American Trust*, 31 REAL PROP. PROB. & TR. J. 251 (1996). *See also* Section 1012 of the Uniform Trust Code and comment.

SECTION 427. DEATH OF INDIVIDUAL SUBJECT TO CONSERVATORSHIP.

(a) If an individual subject to conservatorship dies, the conservator shall deliver to the court for safekeeping any will of the individual in the conservator's possession and inform the personal representative named in the will if feasible, or if not feasible, a beneficiary named in the will, of the delivery.

[(b) If 40 days after the death of an individual subject to conservatorship no personal representative has been appointed and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative to administer and distribute the decedent's estate. The conservator shall give notice to a person nominated as personal representative by a will of the decedent of which the conservator is aware. The court may grant the application if there is no objection and endorse the letters of office to note that the individual formerly subject to conservatorship is deceased and the conservator has acquired the powers and duties of a personal representative.

(c) Issuance of an order under this section has the effect of an order of appointment of a personal representative under [Section 3-308 and Parts 6 through 10 of Article III of the Uniform Probate Code]].

(d) On the death of an individual subject to conservatorship, the conservator shall conclude the administration of the conservatorship estate as provided in Section 431.

Legislative Note: *Subsections (b) and (c) are bracketed for several reasons. First, the enacting jurisdiction's probate code already may address the right of the conservator to petition for appointment as personal representative or the right of the conservator to distribute the conservatorship assets directly to the estate beneficiaries. Second, subsections (b) and (c) are*

not essential and may be omitted if the enacting jurisdiction chooses. Finally, subsection (b) is specifically tailored for a state, such as one that has enacted the Uniform Probate Code, which allows appointment of a personal representative without prior notice to estate beneficiaries. A state that requires notice to interested persons before appointment of a personal representative should modify subsection (b) accordingly.

Comment

This section, which is a revision of Section 428 of the 1997 act, supplements Section 431 on termination of conservatorships. Unlike Section 431, which addresses termination generally, this section only addresses responsibilities incurred by reason of the death of the individual subject to conservatorship.

The general rule is stated in subsection (d), which provides that upon the death of the individual subject to conservatorship, the conservator shall conclude the administration of the conservatorship estate as provided in Section 431. Subsection (a) addresses the conservator's obligation to deliver the will. Subsections (b) and (c), which are both optional for enacting states, authorize a conservator to open a decedent's estate if no one else with authority takes action within 40 days after the death.

Pursuant to subsection (a), the conservator must deliver to the court for safekeeping any will of the individual subject to conservatorship which may have come into the conservator's possession, must inform the personal representative named in the will if feasible, or if not, a beneficiary, that the will has been delivered, and must retain the conservatorship estate for delivery to the personal representative or to another person entitled to it.

Subsections (b) and (c) address the particular problems that can arise if the estate beneficiaries fail to take action to appoint a personal representative for the individual's estate. The conservator will then be unable to close the estate because there is no "successor" to whom to deliver the individual's assets. To enable the conservator to expeditiously close the conservatorship estate, this section specifies a streamlined process whereby the conservator can secure appointment as personal representative. These subsections are bracketed and made optional for enacting states for several reasons. First, the enacting jurisdiction's probate code may already specifically address the right of the conservator to petition for appointment as personal representative or the right of the conservator to distribute the conservatorship assets directly to the estate beneficiaries. Second, subsections (b) and (c) are not essential and may be omitted if the enacting jurisdiction so chooses. Even though the state's statute may not specifically authorize a conservator to petition for appointment as personal representative, a conservator, like any other holder of a decedent's assets, may eventually take action to effect a distribution. Finally, subsection (b) is specifically tailored for states, such as states which have enacted the Uniform Probate Code, that allow the appointment of a personal representative without prior notice to the estate beneficiaries. For example, should the state enacting this act have also enacted the UPC, Section 3-705 of that Code would not require the conservator-personal representative to give notice until after the appointment. States which require notice to interested persons prior to the appointment of a personal representative would need to modify this section accordingly.

SECTION 428. PRESENTATION AND ALLOWANCE OF CLAIM.

(a) A conservator may pay, or secure by encumbering property included in the conservatorship estate, a claim against the conservatorship estate or the individual subject to conservatorship arising before or during the conservatorship, on presentation and allowance in accordance with the priorities under subsection (d). A claimant may present a claim by:

(1) sending or delivering to the conservator a statement in a record of the claim, indicating its basis, the name and address of the claimant, and the amount claimed; or

(2) filing the claim with the court, in a form acceptable to the court, and sending or delivering a copy of the claim to the conservator.

(b) A claim under subsection (a) is presented on receipt by the conservator of the statement of the claim or the filing with the court of the claim, whichever first occurs. A presented claim is allowed if it is not disallowed in whole or in part by the conservator in a record sent or delivered to the claimant not later than 60 days after its presentation. Before payment, the conservator may change an allowance of the claim to a disallowance in whole or in part, but not after allowance under a court order or order directing payment of the claim. Presentation of a claim tolls until 30 days after disallowance of the claim the running of a statute of limitations that has not expired relating to the claim.

(c) A claimant whose claim under subsection (a) has not been paid may petition the court to determine the claim at any time before it is barred by a statute of limitations, and the court may order its allowance, payment, or security by encumbering property included in the conservatorship estate. If a proceeding is pending against the individual subject to conservatorship at the time of appointment of the conservator or is initiated thereafter, the moving party shall give the conservator notice of the proceeding if it could result in creating a

claim against the conservatorship estate.

(d) If a conservatorship estate is likely to be exhausted before all existing claims are paid, the conservator shall distribute the estate in money or in kind in payment of claims in the following order:

(1) costs and expenses of administration;

(2) a claim of the federal or state government having priority under law other than this [act];

(3) a claim incurred by the conservator for support, care, education, health, or welfare previously provided to the individual subject to conservatorship or an individual who is in fact dependent on the individual subject to conservatorship;

(4) a claim arising before the conservatorship; and

(5) all other claims.

(e) Preference may not be given in the payment of a claim under subsection (d) over another claim of the same class. A claim due and payable may not be preferred over a claim not due unless:

(1) doing so would leave the conservatorship estate without sufficient funds to pay the basic living and health-care expenses of the individual subject to conservatorship; and

(2) the court authorizes the preference under Section 414(a)(8).

(f) If assets of a conservatorship estate are adequate to meet all existing claims, the court, acting in the best interest of the individual subject to conservatorship, may order the conservator to grant a security interest in the conservatorship estate for payment of a claim at a future date.

Comment

This section is similar to Section 429 of the 1997 act.

Subsection (a) provides for the conservator's payment of appropriate claims and sets forth the methods by which claims can be presented. Subsection (b) addresses when claims are deemed presented. Subsection (c) authorizes a claimant whose claim has not been paid to petition the court. Should the estate be insufficient to satisfy all claims, payment will then be made in accordance with the priorities specified in subsection (d). Subsection (e) addresses the conflict that can sometimes arise between claims that are due and payable versus claims that are valid but for which payment is not yet due. Subsection (f) permits a conservator, with court approval, to grant a creditor a security interest in the conservatorship for payment of a claim at a future date. The granting of such a security interest is sometimes done so that the estate may be closed even though some claims are still outstanding.

This section should be read in conjunction with Section 414(a)(8), which permits a court to grant a creditor who has provided basic living expenses a higher priority for payment from an insolvent estate than would otherwise apply under this section. But as stated in the comment to Section 414, the higher priority provided in this act does not alter creditor priority stated in federal bankruptcy law or the Internal Revenue Code. Nor does subsection (d), which addresses creditor priority in insolvent estates, preclude the filing of a petition for bankruptcy if the individual subject to conservatorship is otherwise eligible.

This section is in essence an abbreviated version of the claims procedure for decedent's estates found in Article III, Part 8 of the Uniform Probate Code (UPC) but is modified for purposes of conservatorship. For additional background on claims procedure, reference is made to UPC Article III, Part 8.

SECTION 429. PERSONAL LIABILITY OF CONSERVATOR.

(a) Except as otherwise agreed by a conservator, the conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the conservatorship estate unless the conservator fails to reveal the conservator's representative capacity in the contract or before entering into the contract.

(b) A conservator is personally liable for an obligation arising from control of property of the conservatorship estate or an act or omission occurring in the course of administration of the conservatorship estate only if the conservator is personally at fault.

(c) A claim based on a contract entered into by a conservator in a fiduciary capacity, an obligation arising from control of property included in the conservatorship estate, or a tort committed in the course of administration of the conservatorship estate may be asserted against

the conservatorship estate in a proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable for the claim.

(d) A question of liability between a conservatorship estate and the conservator personally may be determined in a proceeding for accounting, surcharge, or indemnification or another appropriate proceeding or action.

Comment

This section is similar to Section 430 of the 1997 act with modest revisions.

At common law, a fiduciary was personally liable on contracts entered into in a fiduciary capacity. If the contract was proper, the fiduciary could be reimbursed from the fiduciary assets but was personally liable for the deficiency if the assets were insufficient. Modern fiduciary statutes, such as Section 1010 of the Uniform Trust Code (UTC) and Section 3-808 of the Uniform Probate Code (UPC), limit the fiduciary's liability as long as the fiduciary relationship is properly disclosed.

This section is consistent with the provisions of the UTC and UPC although it varies in some details. Subsection (a) generally provides that the conservator is not personally liable for contracts entered into by the conservator as long as the conservator discloses the representative capacity in the contract and identifies the estate. But subsection (a) then goes beyond the UTC and the UPC by also limiting liability if the representative capacity was revealed prior to the contract even though not stated in the contract itself. The effect of subsection (a) is to limit the contracting party's recovery to the estate assets if the contracting party was aware of the fiduciary capacity at the time of the contract whether or not expressly stated in the contract. But even if the representative capacity is disclosed, the conservator will be personally liable if the contract expressly so provides.

Subsection (b) reverses the ordinary common law rule that a conservator, as a fiduciary, is liable for torts committed in the course of administering the conservatorship property regardless of the conservator's personal fault. The protection from liability provided by this subsection does not apply, however, if the conservator is "personally at fault," meaning that the conservator committed the tort either intentionally or negligently.

At common law, the claimant seeking to enforce a contract with the conservator would first sue the conservator personally and then the conservator would file a second action seeking reimbursement. Subsection (c) simplifies this process by providing that a conservator may be sued in a fiduciary capacity, whether or not the conservator is personally liable on the claim. As subsection (d) indicates, the types of proceedings in which the respective liabilities of the conservatorship estate and conservator can be determined include a proceeding for an accounting, surcharge, or indemnification.

SECTION 430. REMOVAL OF CONSERVATOR; APPOINTMENT OF SUCCESSOR.

(a) The court may remove a conservator for failure to perform the conservator's duties or other good cause and appoint a successor conservator to assume the duties of the conservator.

(b) The court shall hold a hearing to determine whether to remove a conservator and appoint a successor on:

(1) petition of the individual subject to conservatorship, conservator, or person interested in the welfare of the individual which contains allegations that, if true, would support a reasonable belief that removal of the conservator and appointment of a successor may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed during the preceding six months;

(2) communication from the individual subject to conservatorship, conservator, or person interested in the welfare of the individual which supports a reasonable belief that removal of the conservator and appointment of a successor may be appropriate; or

(3) determination by the court that a hearing would be in the best interest of the individual subject to conservatorship.

(c) Notice of a petition under subsection (b)(1) must be given to the individual subject to conservatorship, the conservator, and any other person the court determines.

(d) An individual subject to conservatorship who seeks to remove the conservator and have a successor appointed has the right to choose an attorney to represent the individual in this matter. [If the individual is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 406.] The court shall award reasonable attorney's fees to the attorney as provided in Section 119.

(e) In selecting a successor conservator, the court shall follow the priorities under Section 410.

(f) Not later than 30 days after appointing a successor conservator, the court shall give notice of the appointment to the individual subject to conservatorship and any person entitled to notice under Section 411(e) or a subsequent order.

Legislative Note: *A state may make the policy decision to include the bracketed language in subsection (d). This policy decision parallels Alternative A in Section 405.*

Comment

This section is based in part on Section 112 of the 1997 act, which covered termination of the guardianship or conservatorship as well as changes in a guardian's or conservator's appointment. This act, by comparison, divides the issue of removal of an appointee (which focuses on the appointee's abilities and actions), which is addressed here, from the issue of termination or modification of an appointment (which focuses on the needs, abilities, and limitations of the individual subject to appointment), which is addressed in Section 431. This section mirrors Section 318, which governs removal of a guardian and appointment of a successor guardian.

Subsection (a) empowers the court to remove a conservator for failure to perform duties or for other good cause. Removal for failure to perform duties includes situations in which the conservator is not performing the conservator's duties either because the conservator is failing to act or because the conservator is acting in a manner inconsistent with the requirements of this act. Good cause sometimes may be found to exist even if the conservator is not personally at fault. Similar to the grounds set forth in Section 706(b) of the Uniform Trust Code, which include a request by qualified beneficiaries as a factor the court may consider in deciding whether to remove a trustee, a court may similarly consider a request of the individual under conservatorship, or a parent of a minor subject to conservatorship, as a factor in deciding whether good cause exists to remove a conservator. In determining whether to remove the conservator, every effort should be made to determine the wishes of the individual subject to conservatorship with regard to the proposed removal. Courts seeking examples of reasons why removal might be in order may wish to consult their state's law on removal of a trustee. *See generally* Uniform Trust Code §706 and comment; Restatement (Third) of Trusts §37 (2003).

Section 112(b) of the 1997 act authorized the court to remove a conservator if removal was in the best interest of the individual subject to conservatorship or for other good cause. In light of this act's emphasis on substituted judgment as the standard for conservator decisions, subsection (a) of removes "best interest" as an independent basis for removal. The drafting committee concluded that the reference to "best interest" might unnecessarily restrict the court's ability to apply the more flexible "good cause" standard.

Subsection (b)(1) authorizes a petition for removal of the conservator to be filed by the individual subject to conservatorship, the conservator, or any person interested in the individual's welfare. Thus, the fact that the individual is subject to conservatorship in no way limits the individual's right to seek removal.

Subsection (b) requires the court to hold a hearing on whether the conservator should be removed under three specified circumstances: (1) if the court determines a hearing would be in the best interest of the individual subject to conservatorship; (2) if the individual, conservator, or another person interested in the welfare of the individual petitions for removal and the petition contains allegations that—if true—would support a reasonable belief that removal is in order; and (3) if the court receives a communication from any such person that supports a reasonable belief that removal may be appropriate. The form that the communication takes is not determinative, and includes a grievance filed under Section 127. The fact that the court has reason to believe that the allegations are not true is not a sufficient reason to refuse to hold a hearing. It is important that the court hear the evidence as to whether removal is appropriate, and not reach conclusions without a considered process. To avoid excessive drain on judicial resources, however, the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months.

Subsection (c) requires that notice of a petition to remove the conservator filed by the individual subject to conservatorship, conservator, or person interested in the individual's welfare under subsection (b)(1) be given to the individual, the conservator, and any other person the court determines. Subsection (c) does not expressly require notice be given if a hearing is held pursuant to an informal communication under subsection (b)(2) or independent determination by the court under subsection (b)(3), but it would appear that the notice given would, as a practical matter, be the same. For a hearing on the guardian's removal, notice should always be given to the individual under guardianship and to the guardian, and the court always has authority to order notice to other persons.

Subsection (d) provides that an individual subject to conservatorship seeking to have the conservator removed has the right to choose an attorney to represent him or her in the matter. Such representation is essential to protecting the individual's due process rights. To ensure the availability of such representation, the court is required to award reasonable attorney fees to such an attorney in accordance with Section 119 of this act. Subsection (d) includes bracketed language that an enacting jurisdiction may adapt to indicate its preferences on when to require a court to appoint an attorney for the individual subject to conservatorship.

If the court removes a conservator, the court must then appoint a successor conservator. This is because removal simply ends the particular appointment, it does not terminate the conservatorship or modify other terms of the conservatorship. Subsection (e) instructs the court to use the same priorities it uses in appointing a conservator in the first place when appointing a successor conservator.

Subsection (f) requires timely notice of the appointment of the successor conservator to the individual subject to conservatorship and other persons entitled to such notice.

SECTION 431. TERMINATION OR MODIFICATION OF CONSERVATORSHIP.

(a) A conservatorship for a minor terminates on the earliest of:

(1) a court order terminating the conservatorship;

(2) the minor becoming an adult or, if the minor consents or the court finds by clear-and-convincing evidence that substantial harm to the minor's interests is otherwise likely, attaining 21 years of age;

(3) emancipation of the minor; or

(4) death of the minor.

(b) A conservatorship for an adult terminates on order of the court or when the adult dies.

(c) An individual subject to conservatorship, the conservator, or a person interested in the welfare of the individual may petition for:

(1) termination of the conservatorship on the ground that a basis for appointment under Section 401 does not exist or termination would be in the best interest of the individual or for other good cause; or

(2) modification of the conservatorship on the ground that the extent of protection or assistance granted is not appropriate or for other good cause.

(d) The court shall hold a hearing to determine whether termination or modification of a conservatorship is appropriate on:

(1) petition under subsection (c) which contains allegations that, if true, would support a reasonable belief that termination or modification of the conservatorship may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months;

(2) a communication from the individual subject to conservatorship, conservator, or person interested in the welfare of the individual which supports a reasonable belief that termination or modification of the conservatorship may be appropriate, including because the functional needs of the individual or supports or services available to the individual have changed;

(3) a report from a guardian or conservator which indicates that termination or modification may be appropriate because the functional needs or supports or services available to the individual have changed or a protective arrangement instead of conservatorship or other less restrictive alternative is available; or

(4) a determination by the court that a hearing would be in the best interest of the individual.

(e) Notice of a petition under subsection (c) must be given to the individual subject to conservatorship, the conservator, and any such other person the court determines.

(f) On presentation of prima facie evidence for termination of a conservatorship, the court shall order termination unless it is proven that a basis for appointment of a conservator under Section 401 exists.

(g) The court shall modify the powers granted to a conservator if the powers are excessive or inadequate due to a change in the abilities or limitations of the individual subject to conservatorship, the individual's supports, or other circumstances.

(h) Unless the court otherwise orders for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the individual subject to conservatorship which apply to a petition for conservatorship.

(i) An individual subject to conservatorship who seeks to terminate or modify the terms

of the conservatorship has the right to choose an attorney to represent the individual in this matter. [If the individual is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 406.] The court shall award reasonable attorney's fees to the attorney as provided in Section 119.

(j) On termination of a conservatorship other than by reason of the death of the individual subject to conservatorship, property of the conservatorship estate passes to the individual. The order of termination must direct the conservator to file a final report and petition for discharge on approval by the court of the final report.

(k) On termination of a conservatorship by reason of the death of the individual subject to conservatorship, the conservator promptly shall file a final report and petition for discharge on approval by the court of the final report. On approval of the final report, the conservator shall proceed expeditiously to distribute the conservatorship estate to the individual's estate or as otherwise ordered by the court. The conservator may take reasonable measures necessary to preserve the conservatorship estate until distribution can be made.

(*l*) The court shall issue a final order of discharge on the approval by the court of the final report and satisfaction by the conservator of any other condition the court imposed on the conservator's discharge.

Legislative Note: *A state may make the policy decision to include the bracketed language in subsection (i). This policy decision parallels Alternative A in Section 305.*

Comment

Section 431 governs termination and modification of a conservatorship. This topic was addressed in Section 112 of the 1997 act, which also covered changes in the conservator's appointment, which are now addressed in Section 430. When a conservatorship is terminated, the authority of the conservator ends and all powers granted to the conservator are restored to the individual who was formerly subject to conservatorship if that individual is still living. Modification occurs when the court changes the powers granted to the conservator under a continuing conservatorship. Modification can expand or contract the conservator's powers.

Subsection (a) provides that a conservatorship for a minor terminates when terminated by a court order, the minor is emancipated, or the minor dies. Subsection (a) further provides that a conservatorship for a minor terminates when the minor reaches adulthood unless either (1) the minor consents to the conservatorship continuing to the age of 21, or (2) the court finds by clear-and-convincing evidence that the minor's interests would be substantially harmed if the conservatorship did not continue to the age of 21. If either of these two conditions are met, the conservatorship may continue until the minor obtains 21 years of age. In no event may a conservatorship imposed on a minor continue after the age of 21. If the minor continues to need a conservator after the age of 21, a new proceeding must be instituted and the court must find that a basis exists for imposing a conservatorship on an adult under Section 401(b).

By allowing a conservatorship to continue after the age of majority up to age 21 in limited circumstances, subsection (a) is designed to support transition planning for persons with intellectual disabilities and developmental disabilities as they transition from childhood to adulthood. Extending the conservatorship in this manner may help avoid imposition of an Article 3 guardianship or a conservatorship that extends indefinitely in adulthood.

Subsection (b) states that a conservatorship for an adult terminates on court order or when the adult dies.

Subsection (c) provides that the individual subject to conservatorship, the conservator, or any person interested in the individual's welfare may petition for termination or modification of the conservatorship. Thus, the fact that the individual is subject to conservatorship in no way limits the individual's right to seek court review.

Pursuant to subsection (d), the court must hold a hearing to determine whether termination or modification is appropriate under four circumstances: (1) if the court concludes that such a hearing would be in the best interest of the individual subject to conservatorship; (2) if a report from either a guardian or conservator indicates that termination or modification may be appropriate because the needs of the individual have changed or a less restrictive alternative may be available; (3) if the individual, conservator, or another person interested in the welfare of the individual petitions for termination or removal and the petition contains allegations that—if true—would support a reasonable belief that termination or modification is in order; and (4) if the court receives a communication from the individual, conservator, or person interested in the individual's welfare that supports a reasonable belief that termination or modification may be appropriate. The form that the communication takes is not determinative, and could include a grievance filed under Section 127. The fact that the court has reason to believe that the allegations are not true is not a sufficient reason to refuse to hold a hearing. It is important that the court hear the evidence as to whether modification or termination is appropriate, and not reach conclusions without a considered process. To avoid excessive drain on judicial resources, however, the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months. Permitting a communication that falls short of a petition to trigger reconsideration of the conservatorship is necessary to make restoration a practical possibility for individuals subject to conservatorship. *See* Erica Wood, Pamela Teaster, and Jenica Cassidy, *Restoration of Rights in Adult Guardianship* 42 (American Bar Association Commission on Law and Aging with the Virginia Tech Center for Gerontology,

2017) (reporting that "[t]he filing of a formal petition requesting restoration is burdensome or impossible for many individuals subject to guardianship").

Subsection (e) requires notice of a petition to terminate or modify the conservatorship filed by the individual, conservator, or person interested in the individual's welfare under subsection (c) be given to the individual, the conservator, and any other person the court determines. Subsection (e) does not expressly require that notice be given if a hearing is held pursuant to an informal communication under subsection (d)(2) or independent determination by the court under subsection (d)(3), but it would appear that the notice given would, as a practical matter, be the same. For a hearing on the conservator's removal, notice should always be given to the individual under conservatorship and to the conservator, and the court always has authority to order notice to other persons.

Subsection (f) requires a court to terminate a conservatorship on presentation of prima facie evidence that supports termination unless it is proven that it would be proper to impose a conservatorship if a petition for conservatorship were brought at the current time. That is, if there is no basis for imposing a conservatorship under Section 401, then the court may not continue the conservatorship.

Subsection (g) requires the court to modify the conservator's powers if they are excessive or inadequate due to a change in the abilities or limitations of the individual, the individual's supports, or other circumstances. Thus, even if the individual's abilities have not improved, the court might be required to reduce the powers granted to the conservator if new, less restrictive alternatives become available (for example, the individual now has access to greater decision-making support, or technological assistance). Similarly, the court might be required to increase the powers granted the conservator if the individual's abilities have deteriorated creating an unmet need, and no less restrictive alternatives are available.

Subsection (h) requires that unless the court otherwise orders for good cause, before terminating or modifying a conservatorship for an individual under this section, the court must follow the same procedures to safeguard the rights of the respondent that apply at a hearing on a petition for an original appointment. These procedures include appointment of a visitor and may also include appointment of counsel. This subsection is intended to ensure the due process rights of the individual subject to conservatorship are fully respected, and the court is using a process that will provide the court with the evidence needed to make an appropriate and considered decision.

Subsection (i) recognizes the right of an individual subject to conservatorship who seeks to terminate or modify that conservatorship to be represented by counsel. Such representation is essential to protect the individual's due process rights. To ensure the availability of such representation, the court is required to award reasonable attorney fees to such an attorney in accordance with Section 119 of this act. As noted in the comments to Section 119, such compensation is important to ensure access to counsel for those seeking to restore rights. *See* Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Ethics and Legality of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 603 (2016) ("having the right to directly challenge the continued necessity or terms of the guardianship, including who serves as guardian, is virtually meaningless without the accompanying right to legal

representation."). Attorneys' concerns about payment for their services are a significant barrier to attorneys accepting representation of individuals subject to guardianship or conservatorship. *See* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L. J. 83, 102 (2015). Subsection (g) includes bracketed language that an enacting jurisdiction may adapt to indicate its preferences on when to require a court to appoint an attorney for the individual.

Subsections (j) and (k) specify the effect of termination on property that is part of the conservatorship estate. If the conservatorship terminated for a reason other than the individual's death, the property passes to the individual. If the conservatorship terminated because the individual died, the property passes to the individual's estate or as otherwise ordered by the court. Distribution of the conservatorship estate upon the death of the individual is also addressed in Section 427, "Death of Individual Subject to Conservatorship."

Subsections (j), (k), and (*l*) govern discharge of the conservator. Upon termination of a conservatorship, a conservator is not entitled to an order of discharge until the court approves the conservator's final report and the conservator satisfies any other condition the court imposes for the conservator's discharge. A "report" refers to a full and detailed accounting of monies received and expended, as well as other matters, including a description of the conservator's activities. *See* Section 423 for the required contents. A report lacking sufficient detail will preclude entry of the final order of discharge. Until the final order of discharge is entered, a conservator remains liable for previous acts as well as the obligation to account for the assets and funds of the individual subject to conservatorship as provided in Section 423, "Conservator's Report and Accounting; Monitoring."

Prior to entering a final order of discharge, the court should confirm that the conservator has accounted sufficiently for the assets and other property and has executed the appropriate documents and delivered the property under the conservator's control.

As a general matter, this section is responsive to concerns that individuals subject to conservatorship have historically faced often insurmountable barriers to restoration of rights. *See generally* Erica Wood, Pamela Teaster, and Jenica Cassidy, Restoration of Rights in Adult Guardianship (American Bar Association Commission on Law and Aging with the Virginia Tech Center for Gerontology, 2017). Subsection 431, together with other provisions in this act, is designed to reduce those barriers so that individuals' whose needs could be met by less restrictive means do not face unnecessary deprivations of liberty.

SECTION 432. TRANSFER FOR BENEFIT OF MINOR WITHOUT APPOINTMENT OF CONSERVATOR.

(a) Unless a person required to transfer funds or other property to a minor knows that a conservator for the minor has been appointed or a proceeding is pending for conservatorship, the person may transfer an amount or value not exceeding $[15,000] in a 12-month period to:

(1) a person that has care or custody of the minor and with whom the minor resides;

(2) a guardian for the minor;

(3) a custodian under [the Uniform Transfers to Minors Act or Uniform Gifts to Minors Act]; or

(4) a financial institution as a deposit in an interest-bearing account or certificate solely in the name of the minor and shall give notice to the minor of the deposit.

(b) A person that transfers funds or other property under this section is not responsible for its proper application.

(c) A person that receives funds or other property for a minor under subsection (a)(1) or (2) may apply it only to the support, care, education, health, or welfare of the minor, and may not derive a personal financial benefit from it, except for reimbursement for necessary expenses. Funds not applied for these purposes must be preserved for the future support, care, education, health, or welfare of the minor, and the balance, if any, transferred to the minor when the minor becomes an adult or otherwise is emancipated.

Comment

This section is similar to Section 104 of the 1997 act except that the suggested amount in subsection (a) that may be disbursed has been increased to $15,000 on account of inflation. By contrast, the amount specified in the 1997 act was originally set at $5,000 and was increased to $10,000 in 2010.

The section is designed primarily to facilitate required transfers of funds such as child support. When a minor annually receives from a specific payor property or cash of $15,000 or less over a 12-month period, it often would be cumbersome and unnecessarily expensive to require the establishment of a conservatorship to handle the payments. This section allows the person transferring the property to do so in a more expeditious way.

Subsection (a) provides several payment options to the person transferring the property. The person may make the transfer to the person having care and custody of the minor when the minor resides with that person, or may instead make payments to the minor's guardian, a custodian

under the Uniform Transfers to Minors Act or custodial trustee under the Uniform Custodial Trust Act, or to a financial institution as a deposit in an interest-bearing account in the sole name of the minor if notice of the deposit is given to the minor.

To encourage payors to make distributions under this section, subsection (b) provides that a person transferring money or property under this section is not responsible for its proper application. However, the protection does not apply if the person required to make the transfer knows that a conservator has been appointed or that there is a proceeding pending for the appointment of a conservator. Consequently, the fact that a guardian has been appointed does not require that payment be made to that guardian. Should a guardian desire such authority, the appropriate course is for the guardian to petition the court to be appointed as conservator.

Although the person making the transfer has no duty or obligation to see that the money or property is properly applied, this section is a default statute and does not override any specific provisions in a will or trust instrument relating to monies to be paid to a minor. In those cases, the duty of the person making the transfer would be dictated by the terms of the will or trust instrument. This section also does not override the provisions of other statutes in the enacting jurisdiction such as the Uniform Transfers to Minors Act, which allow payment by alternative means based on the size of the minor's total estate, as opposed to this section, which allows payment based on the annual payment obligation of the person making the payment.

Subsection (c) limits the use of the money or property to the minor's support, care, education, health or welfare. Only necessary expenses may be reimbursed from this money or property, with the balance being preserved for the minor's future education, health, support, care or welfare. This section does not apply to child support payments made pursuant to a court order because child support payments are made to another for the minor's benefit.

While a recipient of funds is not a fiduciary in the normally understood sense of a person appointed by the court or by written instrument, a recipient under this section is subject to fiduciary obligations. Under subsection (c), the recipient may not derive any personal benefit from the transfer and must preserve funds not used for the minor's benefit and transfer any balance to the minor upon emancipation or attainment of majority. Should the recipient misapply the funds or property transferred, the recipient, given this fiduciary role, could be liable for breach of trust.

The person receiving the monies may in appropriate cases consider the purchase of an annuity or some other financial arrangement whereby payout occurs at a time subsequent to the minor's attainment of majority. But to provide more certainty for the transaction the recipient should consider petitioning the court under Article 5 for approval of the purchase as a protective arrangement.

[ARTICLE] 5

OTHER PROTECTIVE ARRANGEMENTS

SECTION 501. AUTHORITY FOR PROTECTIVE ARRANGEMENT.

(a) Under this [article], a court:

(1) on receiving a petition for a guardianship for an adult may order a protective arrangement instead of guardianship as a less restrictive alternative to guardianship; and

(2) on receiving a petition for a conservatorship for an individual may order a protective arrangement instead of conservatorship as a less restrictive alternative to conservatorship.

(b) A person interested in an adult's welfare, including the adult or a conservator for the adult, may petition under this [article] for a protective arrangement instead of guardianship.

(c) The following persons may petition under this [article] for a protective arrangement instead of conservatorship:

(1) the individual for whom the protective arrangement is sought;

(2) a person interested in the property, financial affairs, or welfare of the individual, including a person that would be affected adversely by lack of effective management of property or financial affairs of the individual; and

(3) the guardian for the individual.

Comment

Section 501, together with the subsequent sections of Article 5, create an alternative to guardianship and conservatorship for individuals whose needs can be met without the imposition of such a restrictive arrangement. Specifically, these sections allow the court to enter an order that is precisely tailored to the individual's circumstances and needs, and that is limited in scope and, potentially, duration. By allowing the court to craft a simpler and less intrusive protective arrangement, Article 5 is responsive to the Third National Guardianship Summit's call to embrace such less restrictive alternatives. *See generally Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191 (2012). In addition, such limited

orders may reduce the costs to the individual (e.g., by avoiding the expense of a paying a conservator) and costs to the court system (e.g., by avoiding the costs associated with monitoring a conservator).

Subsection (a)(1) allows a court to proceed with the process for ordering a protective arrangement instead of guardianship for an adult either upon a petition for such an arrangement or upon a petition for a guardianship of an adult. Subsection (a)(2) allows a court to proceed with the process for ordering a protective arrangement instead of conservatorship for either an adult or minor upon a petition for such an arrangement or upon a petition for conservatorship for the adult or minor.

Subsections (b) and (c) state who may petition for a protective arrangement instead of guardianship or conservatorship. It grants standing to petition to the persons who would have standing to petition for guardianship under Section 302 or conservatorship under Section 402. It also gives standing to the guardian for the respondent to petition for a protective arrangement instead of conservatorship. This additional standing to petition is designed to allow the guardian to protect the financial interests of the respondent without taking the more intrusive step of petitioning for conservatorship.

SECTION 502. BASIS FOR PROTECTIVE ARRANGEMENT INSTEAD OF GUARDIANSHIP FOR ADULT.

(a) After the hearing on a petition under Section 302 for a guardianship or under Section 501(b) for a protective arrangement instead of guardianship, the court may issue an order under subsection (b) for a protective arrangement instead of guardianship if the court finds by clear-and-convincing evidence that:

(1) the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; and

(2) the respondent's identified needs cannot be met by a less restrictive alternative.

(b) If the court makes the findings under subsection (a), the court, instead of appointing a guardian, may:

(1) authorize or direct a transaction necessary to meet the respondent's need for health, safety, or care, including:

(A) a particular medical treatment or refusal of a particular medical treatment;

(B) a move to a specified place of dwelling; or

(C) visitation or supervised visitation between the respondent and another person;

(2) restrict access to the respondent by a specified person whose access places the respondent at serious risk of physical, psychological, or financial harm; and

(3) order other arrangements on a limited basis that are appropriate.

(c) In deciding whether to issue an order under this section, the court shall consider the factors under Sections 313 and 314 which a guardian must consider when making a decision on behalf of an adult subject to guardianship.

Comment

Subsection (a) allows the court to order a protective arrangement instead of guardianship for an adult if the court makes the findings required to appoint a guardian for that respondent and, as is required for appointment of a guardian, does so based on clear-and-convincing evidence. Thus, subsection (a) does not lower the standard for court-based intervention. Rather, it provides the court with the ability to order an arrangement that is less restrictive than guardianship where such an order would meet the adult's need.

As set forth in subsection (b), after making the findings required by subsection (a), the court may authorize or direct any transaction necessary to meet the adult's need for health, safety, or care. The list of transactions in subsection (b) is non-exclusive. Listed are (1) a particular medical treatment or refusal of a particular medical treatment, (2) a move to a specified place of dwelling, and (3) visitation or supervised visitation between the respondent and another person. An order requiring a third party to permit visitation with the respondent, and potentially setting forth a schedule for such visitation, may be appropriate where the respondent has been wrongfully denied the right to engage with others. The court may also order an arrangement that restricts access "to the respondent by a specified person whose access places the respondent at serious risk of physical, psychological, or financial harm."

When making an order under this section, the court is acting much like a guardian would in making a decision for an individual subject to guardianship. Accordingly, subsection (c) requires the court to consider factors a guardian must consider when making decisions for an adult. The result is that the court may not make an order simply because the court believes the order would be in the best interest of the adult. The court must enter an order consistent with what the court determines the adult would decide if the adult were able to make the decision. This standard will therefore require the court, for example, to consider the adult's wishes and values.

Deliberately not included in this section is a provision allowing for a protective order instead of guardianship for a minor. The possibility of such an order was considered as part of the drafting process, but was rejected amid concerns that it would provide inadequate protection for minors and could impinge on other areas of child welfare law.

SECTION 503. BASIS FOR PROTECTIVE ARRANGEMENT INSTEAD OF CONSERVATORSHIP FOR ADULT OR MINOR.

(a) After the hearing on a petition under Section 402 for conservatorship for an adult or under Section 501(c) for a protective arrangement instead of conservatorship for an adult, the court may issue an order under subsection (c) for a protective arrangement instead of conservatorship for the adult if the court finds by clear-and-convincing evidence that:

(1) the adult is unable to manage property or financial affairs because:

(A) of a limitation in the ability to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; or

(B) the adult is missing, detained, or unable to return to the United States;

(2) an order under subsection (c) is necessary to:

(A) avoid harm to the adult or significant dissipation of the property of the adult; or

(B) obtain or provide funds or other property needed for the support, care, education, health, or welfare of the adult or an individual entitled to the adult's support; and

(3) the respondent's identified needs cannot be met by a less restrictive alternative.

(b) After the hearing on a petition under Section 402 for conservatorship for a minor or under Section 501(c) for a protective arrangement instead of conservatorship for a minor, the court may issue an order under subsection (c) for a protective arrangement instead of conservatorship for the respondent if the court finds by a preponderance of the evidence that the arrangement is in the minor's best interest, and:

(1) if the minor has a parent, the court gives weight to any recommendation of the parent whether an arrangement is in the minor's best interest;

(2) either:

(A) the minor owns money or property requiring management or protection that otherwise cannot be provided;

(B) the minor has or may have financial affairs that may be put at unreasonable risk or hindered because of the minor's age; or

(C) the arrangement is necessary or desirable to obtain or provide funds or other property needed for the support, care, education, health, or welfare of the minor; and

(3) the order under subsection (c) is necessary or desirable to obtain or provide money needed for the support, care, education, health, or welfare of the minor.

(c) If the court makes the findings under subsection (a) or (b), the court, instead of appointing a conservator, may:

(1) authorize or direct a transaction necessary to protect the financial interest or property of the respondent, including:

(A) an action to establish eligibility for benefits;

(B) payment, delivery, deposit, or retention of funds or property;

(C) sale, mortgage, lease, or other transfer of property;

(D) purchase of an annuity;

(E) entry into a contractual relationship, including a contract to provide for personal care, supportive services, education, training, or employment;

(F) addition to or establishment of a trust;

(G) ratification or invalidation of a contract, trust, will, or other transaction, including a transaction related to the property or business affairs of the respondent; or

(H) settlement of a claim; or

(2) restrict access to the respondent's property by a specified person whose access to the property places the respondent at serious risk of financial harm.

(d) After the hearing on a petition under Section 501(a)(2) or (c), whether or not the court makes the findings under subsection (a) or (b), the court may issue an order to restrict access to the respondent or the respondent's property by a specified person that the court finds by clear-and-convincing evidence:

(1) through fraud, coercion, duress, or the use of deception and control caused or attempted to cause an action that would have resulted in financial harm to the respondent or the respondent's property; and

(2) poses a serious risk of substantial financial harm to the respondent or the respondent's property.

(e) Before issuing an order under subsection (c) or (d), the court shall consider the factors under Section 418 a conservator must consider when making a decision on behalf of an

individual subject to conservatorship.

(f) Before issuing an order under subsection (c) or (d) for a respondent who is a minor, the court also shall consider the best interest of the minor, the preference of the parents of the minor, and the preference of the minor, if the minor is 12 years of age or older.

Comment

Subsections (a) and (b) allow the court to order a protective arrangement instead of conservatorship for an adult or minor respondent if the court makes the findings required to appoint a conservator for that respondent. Thus, subsection (a), which applies to adults, does not lower the standard for court-based intervention. Rather, it provides the court with the ability to order an arrangement that is less restrictive than conservatorship (including a limited conservatorship) where such an order would meet the individual's need. Similarly, subsection (b) authorizes the court to order a protective arrangement instead of conservatorship for a minor if such an arrangement is in the minor's best interest. However, before ordering a protective arrangement for a minor, the court must give weight to the recommendation of a parent.

As set forth in subsection (c), after making the findings required by subsection (a) or (b), the court may authorize or direct any transaction necessary to protect the financial interest or property of the individual about whom the findings were made. The transactions listed in subsection (c) comprise a non-exclusive list. The list is similar to the list of transactions in Section 412(a) of the 1997 act except that this act expressly authorizes an action to establish eligibility for benefits.

Unlike subsections (a) and (b), subsection (d) creates a basis for court intervention that does not exist in Article 4. It allows a court to restrict access to the respondent or the respondent's property by another person who has already engaged in certain types of bad acts. In order to impose the restriction, the court must find by clear-and-convincing evidence that the person being restricted has used fraud, coercion, duress, or deception and control to either cause or attempt to cause some act that did or would have financially harmed the respondent or the respondent's property. The court must also find by clear-and-convincing evidence that the person currently poses a serious risk of substantial financial harm to the respondent or the respondent's property.

Subsection (d) is designed to provide protection for individuals who are at serious risk of substantial financial harm as a result of the types of behaviors frequently referred to as "undue influence." Such behaviors constitute a pernicious, and particularly common, form of financial exploitation. *See generally* Stacey Wood and Pi-Ju Li, *Undue Influence and Financial Capacity: A Clinical Perspective*, 36 GENERATIONS 53 (2012) (discussing the phenomenon of undue influence from a psychological perspective); Mary Joy Quinn, *Friendly Persuasion, Good Salesmanship, or Undue Influence*, 2 MARQUETTE ELDER'S ADVISOR 49 (2001) (describing undue influence and ways in which it can occur).

The relief provided by subsection (d) should be used sparingly and only if no less restrictive alternative is possible. While the restriction on access is placed on the third party who has engaged in bad acts, it also restricts the respondent's freedom of association and choices. Moreover, as the court does not need to find that the respondent's ability to reason or make choices is otherwise impaired before restricting access, subsection (d) can be used to restrict the liberty of an individual who would otherwise be considered fully able and entitled to make decisions for himself or herself.

While subsection (d) was drafted with situations often referred to as "undue influence" in mind, the term "undue influence" was deliberately not used. The decision not to use this term was made in part because the term has been used in so many diverse, and at times inconsistent ways, across a variety of contexts. *See* Mary Joy Quinn et. al, *Undue Influence: Definitions and Applications* (Report to the Borchard Center Foundation on Law and Aging, 2010) (describing the various ways states have defined undue influence and reporting that definitions are typically unclear or incomplete); Stacey Wood and Pi-Ju Li, *Undue Influence and Financial Capacity: A Clinical Perspective*, 36 GENERATIONS 53 (2012) (describing different ways undue influence has been defined in the psychology literature). In addition, the concept of undue influence developed in the in the context of testamentary challenges and, in that context, the "unnaturalness" of a disposition can be evidence of undue influence. *See* Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 KAN. L. REV. 245, 264–67 (2010). The drafting committee did not want to suggest that whether the conditions of this section are met depends on the perceived "naturalness" of the respondent's behavior as such perceptions are easily influenced by the cultural perspectives and biases of the perceiver.

Taken together, subsections (c) and (d) provide a concrete mechanism for protecting an individual from financial exploitation, without the more significant liberty restriction associated with imposition of a conservatorship. Under subsections (c) and (d), rather than imposing a conservatorship, a court may craft a remedy specifically targeted to the individual's circumstances and the threat. For example, a court might authorize a designated individual to apply for Veteran's, social security disability or Medicaid benefits on behalf of the individual; limit access to the adult's property by another person; order the creation and funding of a trust; change title to an account that was compromised by another; or order online automatic payment of a specified bill. These limited remedies can solve a specific problem without imposing a conservatorship with the accompanying management costs to both the individual and the court system. This is important because financial exploitation of older adults is a significant problem around the country, and exploitation is often perpetuated by individuals with whom the victim has an ongoing relationship and thus from whom they may need ongoing protection. *See* RON ACIERNO ET AL., NATIONAL ELDER MISTREATMENT STUDY (2009) (in a national telephone survey of non-institutionalized persons aged sixty and older in the continental United States, finding that more than 5% had experienced financial exploitation by a family member in the past year alone). Such financial exploitation not only has profound implications for the well-being of its victims, it can also have a negative impact on public resources as states may be called on to provide assistance to its victims.

When making an order under this section, the court is acting much like a conservator would in making a decision for an individual subject to guardianship. Accordingly, subsection (e)

requires the court to consider factors a conservator must consider when making decisions for the individual. The result is that the court may not make an order simply because the court believes the order would be in the best interest of the individual. The court must enter an order consistent with what the court determines the individual would decide if the individual were able to make the decision. This standard will therefore require the court to consider the individual's wishes and values, among other factors.

Finally, subsection (f) requires a court considering entering an order for a minor under this section to take into account the best interest of the minor, the preference of the parents of the minor, and the preference of the minor, if the minor is 12 years of age or older. This requirement is designed both to protect the minor and to provide adequate deference to parental rights in accordance with the U.S. Supreme Court's ruling in *Troxel v. Granville*, 530 U.S. 57 (2000).

SECTION 504. PETITION FOR PROTECTIVE ARRANGEMENT. A petition for a protective arrangement instead of guardianship or conservatorship must state the petitioner's name, principal residence, current street address, if different, relationship to the respondent, interest in the protective arrangement, the name and address of any attorney representing the petitioner, and, to the extent known, the following:

(1) the respondent's name, age, principal residence, current street address, if different, and, if different, address of the dwelling in which it is proposed the respondent will reside if the petition is granted;

(2) the name and address of the respondent's:

(A) spouse [or domestic partner] or, if the respondent has none, an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period before the filing of the petition;

(B) adult children or, if none, each parent and adult sibling of the respondent, or, if none, at least one adult nearest in kinship to the respondent who can be found with reasonable diligence; and

(C) adult stepchildren whom the respondent actively parented during the

stepchildren's minor years and with whom the respondent had an ongoing relationship in the two year period immediately before the filing of the petition;

(3) the name and current address of each of the following, if applicable:

(A) a person responsible for the care or custody of the respondent;

(B) any attorney currently representing the respondent;

(C) the representative payee appointed by the Social Security Administration for the respondent;

(D) a guardian or conservator acting for the respondent in this state or another jurisdiction;

(E) a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary;

(F) the fiduciary appointed for the respondent by the Department of Veterans Affairs;

(G) an agent designated under a [power of attorney for health care] in which the respondent is identified as the principal;

(H) an agent designated under a power of attorney for finances in which the respondent is identified as the principal;

(I) a person nominated as guardian or conservator by the respondent if the respondent is 12 years of age or older;

(J) a person nominated as guardian by the respondent's parent[,] [or] spouse [, or domestic partner]in a will or other signed record;

(K) a person known to have routinely assisted the respondent with decision making in the six-month period immediately before the filing of the petition; and

(L) if the respondent is a minor:

(i) an adult not otherwise listed with whom the respondent resides; and

(ii) each person not otherwise listed that had primary care or custody of the respondent for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition;

(4) the nature of the protective arrangement sought;

(5) the reason the protective arrangement sought is necessary, including a brief description of:

(A) the nature and extent of the respondent's alleged need;

(B) any less restrictive alternative for meeting the respondent's alleged need which has been considered or implemented;

(C) if no less restrictive alternative has been considered or implemented, the reason less restrictive alternatives have not been considered or implemented; and

(D) the reason other less restrictive alternatives are insufficient to meet the respondent's alleged need;

(6) the name and current address, if known, of any person with whom the petitioner seeks to limit the respondent's contact;

(7) whether the respondent needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings;

(8) if a protective arrangement instead of guardianship is sought and the respondent has property other than personal effects, a general statement of the respondent's

property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts; and

(9) if a protective arrangement instead of conservatorship is sought, a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of other anticipated income or receipts.

Comment

This section lists the information that must be contained in the petition for a protective arrangement instead of guardianship for an adult under Section 502 or a protective arrangement instead of conservatorship for a minor or adult under Section 503. The requirements for a petition for a protective arrangement instead of guardianship for an adult largely mirror those for a petition for a guardianship of an adult under Section 302. Likewise, the requirements for a petition for a protective arrangement instead of conservatorship largely mirror those for a petition for a conservatorship under Section 402.

Paragraph (1) requires the petitioner to provide basic information about the respondent. If the petitioner is proposing a change in the respondent's place of dwelling, the petition must contain the address of the proposed new dwelling.

Paragraphs (2) and (3) require that the petition list family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 505. These persons will likely have the greatest interest in protecting the respondent and in making certain that the proposed arrangement is appropriate.

Paragraph (4) requires the petition to state the type of protective arrangement sought. As a wide range of arrangements can be ordered under Article 5, this statement will be critical to helping the court understand what the petitioner is requesting.

Paragraph (5) emphasizes the importance of least restrictive alternatives. The petitioner is required to state the nature and extent of the need alleged. The petitioner must also identify all less restrictive alternatives for meeting that respondent's alleged needs that have been considered or implemented, to justify any failure to pursue less restrictive alternatives, and to explain why less restrictive alternatives would not meet the respondent's alleged needs. These requirements serve to provide the court with important information relevant to whether an order under Article 5 is appropriate. These requirements also prompt would-be petitioners to explore less restrictive alternatives.

Paragraph (6) requires the petitioner to state any person with whom the petitioner seeks to limit the respondent's contact. This provision is designed to alert the respondent, and others who receive notice of the petition, of a potential consequence of the order that may raise significant concerns. Giving the respondent, and those entitled to a copy of the petition under Section 504,

full information will enable them to make more informed decisions about whether to oppose the petition.

Paragraph (7) requires the petitioner to set forth respondent's need, if any, for an interpreter, translator, or other form of support to effectively communicate with the court or understand court proceedings. Thus, if the respondent uses another person to help the respondent communicate or understand, the petitioner should include this information.

Finally, paragraphs (8) and (9) require the petitioner to include a general statement of the respondent's property, including an estimated value, insurance and pension information, and information about other anticipated income or receipts. This information should be detailed to enable the visitor to expeditiously complete the report required by Section 506, and to enable the court to determine whether a protective arrangement is needed. An exception is made if the only property is personal effects and the petitioner is seeking a protective arrangement instead of guardianship; if the petitioner seeks a protective arrangement instead of conservatorship, personal effects must also be included in the general statement.

To help petitioners satisfy the requirements of this section, Section 603 contains a sample petition form that petitioners may use.

SECTION 505. NOTICE AND HEARING.

(a) On filing of a petition under Section 501, the court shall set a date, time, and place for a hearing on the petition.

(b) A copy of a petition under Section 501 and notice of a hearing on the petition must be served personally on the respondent. The notice must inform the respondent of the respondent's rights at the hearing, including the right to an attorney and to attend the hearing. The notice must include a description of the nature, purpose, and consequences of granting the petition. The court may not grant the petition if notice substantially complying with this subsection is not served on the respondent.

(c) In a proceeding on a petition under Section 501, the notice required under subsection (b) must be given to the persons required to be listed in the petition under Section 504(1) through (3) and any other person interested in the respondent's welfare the court determines. Failure to give notice under this subsection does not preclude the court from granting the petition.

(d) After the court has ordered a protective arrangement under this [article], notice of a hearing on a petition filed under this [act], together with a copy of the petition, must be given to the respondent and any other person the court determines.

Comment

The notice and hearing requirements of this section largely mirror those of Section 303 and Section 403. This reflects the fact that a proceeding under this article should provide the respondent with the same high level of due process as proceedings under Article 3 and Article 4.

Personal service of the petition and notice of hearing on the respondent is required. Failure to personally serve the respondent is jurisdictional, as is notice that does not substantially comply with the requirements of subsection (b). Notice of hearing must be given to the persons who are listed in the petition, but as provided in subsection (c) failing to give notice to those listed (other than the respondent) is not jurisdictional. For an explanation of why such notice is not jurisdictional, see the comments to Sections 303 and 403.

Subsection (d) addresses the notice requirements for hearings on petitions for orders subsequent to the entry of an order under Article 5. The individual subject to the order, and anyone else the court directs, must be given copies of any notice of hearing and a copy of any petition. This provision helps ensure that the individual subject to the order is kept informed of developments.

Notice under this section is also governed by the general notice requirements for hearings under Section 113, which requires that notice be given at least 14 days prior to the hearing.

SECTION 506. APPOINTMENT AND ROLE OF [VISITOR].

(a) On filing of a petition under Section 501 for a protective arrangement instead of guardianship, the court shall appoint a [visitor]. The [visitor] must be an individual with training or experience in the type of abilities, limitations, and needs alleged in the petition.

(b) On filing of a petition under Section 501 for a protective arrangement instead of conservatorship for a minor, the court may appoint a [visitor] to investigate a matter related to the petition or inform the minor or a parent of the minor about the petition or a related matter.

(c) On filing of a petition under Section 501 for a protective arrangement instead of conservatorship for an adult, the court shall appoint a [visitor][unless the respondent is represented by an attorney appointed by the court]. The [visitor] must be an individual with

training or experience in the types of abilities, limitations, and needs alleged in the petition.

(d) A [visitor] appointed under subsection (a) or (c) shall interview the respondent in person and in a manner the respondent is best able to understand:

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, and the respondent's rights at the hearing on the petition;

(2) determine the respondent's views with respect to the order sought;

(3) inform the respondent of the respondent's right to employ and consult with an attorney at the respondent's expense and the right to request a court-appointed attorney;

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, may be paid from the respondent's assets;

(5) if the petitioner seeks an order related to the dwelling of the respondent, visit the respondent's present dwelling and any dwelling in which it is reasonably believed the respondent will live if the order is granted;

(6) if a protective arrangement instead of guardianship is sought, obtain information from any physician or other person known to have treated, advised, or assessed the respondent's relevant physical or mental condition;

(7) if a protective arrangement instead of conservatorship is sought, review financial records of the respondent, if relevant to the [visitor's] recommendation under subsection (e)(3); and

(8) investigate the allegations in the petition and any other matter relating to the petition the court directs.

(e) A [visitor] under this section promptly shall file a report in a record with the court, which must include:

(1) a recommendation whether an attorney should be appointed to represent the respondent;

(2) to the extent relevant to the order sought, a summary of self-care, independent-living tasks, and financial-management tasks the respondent:

(A) can manage without assistance or with existing supports;

(B) could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making; and

(C) cannot manage;

(3) a recommendation regarding the appropriateness of the protective arrangement sought and whether a less restrictive alternative for meeting the respondent's needs is available;

(4) if the petition seeks to change the physical location of the dwelling of the respondent, a statement whether the proposed dwelling meets the respondent's needs and whether the respondent has expressed a preference as to the respondent's dwelling;

(5) a recommendation whether a professional evaluation under Section 508 is necessary;

(6) a statement whether the respondent is able to attend a hearing at the location court proceedings typically are held;

(7) a statement whether the respondent is able to participate in a hearing and which identifies any technology or other form of support that would enhance the respondent's ability to participate; and

(8) any other matter the court directs.

Legislative Note: *The term "visitor" is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.*

Comment

Subsections (a) through (c) govern when a court may and must appoint a visitor.

Subsection (a) requires the court to appoint a visitor upon receipt of a petition for a protective arrangement instead of guardianship under Section 501. This provision mirrors the requirement in Section 304(a).

Subsection (b) gives the court discretion to appoint a visitor upon receipt of a petition for a protective arrangement instead of conservatorship for a minor under Section 501. Appointment is not required, but may be very helpful in assisting the court to determine whether a protective arrangement is appropriate and, if so, what form the protective arrangement should take. This provision mirrors the requirement in Section 405(a).

Subsection (c) requires the court to appoint a visitor upon receipt of a petition for a protective arrangement instead of a conservatorship for an adult under Section 501 unless: (1) the enacting state has included the bracketed language that no such appointment is required if the adult is represented by an attorney appointed by the court; and (2) the court has in fact appointed an attorney to represent the adult. Notably, if the adult is represented by an attorney appointed by the court, the court may still appoint a visitor if it so chooses. "Visitor" is bracketed in recognition that states use, and may wish to substitute, different words to refer to this position. This provision mirrors the requirement in Section 405(b).

Visitors may be selected from a variety of professions, and may include physicians, psychologists, social workers, or nurses, among others. Regardless of the visitor's profession, subsections (a) and (c) require the visitor for an adult to have training and experience in the type of abilities, limitations, and needs the adult is alleged to have. This training and experience should be sufficient so that the visitor may serve as the "eyes and ears" of the court. Thus, for example, a visitor appointed for a respondent alleged to have Alzheimer's disease must have training or experience in assessing the needs of those with Alzheimer's disease. As the appropriate disposition of the petition may well depend on what services are available to the respondent, the visitor should also be knowledgeable about less restrictive alternatives, including supportive services available in the respondent's community. As the visitor's role is to provide objective information to the court, it is essential that the visitor not have a conflict of interest. For example, the visitor should not be an employee of an institution where the respondent resides. Similarly, the petitioner should not nominate a visitor, and any such nomination should be disregarded by the court.

Under subsection (d), the visitor is tasked with interviewing the respondent in person and explaining to the respondent the nature and potential consequences of the petition and the respondent's rights. The visitor must determine the respondent's views about the order sought. The visitor should communicate in a language in which the respondent is proficient, accompanied by a qualified and disinterested interpreter as necessary. While the visitor is not required to speak the respondent's primary language, it is best practice to use visitors who do. Where this is not practicable, both good practice and due process dictate the use of interpreters so the respondent can understand and communicate. If assistive devices are needed in order for

the visitor to explain to the respondent in a manner the respondent can understand, or for the respondent to communicate with the visitor, the visitor should use those assistive devices.

The visitor, as set forth in subsection (e), is responsible for reporting to the court about a variety of matters about which the court will need information to act on the petition. The visitor's report must be in a record and include a list of recommendations or statements. The particular statements or recommendation required depend, in part, on the type of protective arrangement sought and the type of needs alleged. States enacting this act should consider developing a checklist for the items enumerated in subsection (e).

If the petition is withdrawn prior to the appointment of a visitor, no appointment of a visitor is necessary.

While appointment of a visitor is not without financial cost, appointment of visitors may reduce the states' overall costs by avoiding unnecessary guardianships and conservatorships. Courts faced with limited resources may also wish to consider using volunteer visitor programs. *See* Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community, which was published by the American Bar Association Commission on Law and Aging in 2011.

SECTION 507. APPOINTMENT AND ROLE OF ATTORNEY.

Alternative A

(a) The court shall appoint an attorney to represent the respondent in a proceeding under this [article] if:

(1) the respondent requests the appointment;

(2) the [visitor] recommends the appointment; or

(3) the court determines the respondent needs representation.

Alternative B

(a) Unless the respondent in a proceeding under this [article] is represented by an attorney, the court shall appoint an attorney to represent the respondent, regardless of the respondent's ability to pay.

End of Alternatives

(b) An attorney representing the respondent in a proceeding under this [article] shall:

(1) make reasonable efforts to ascertain the respondent's wishes;

(2) advocate for the respondent's wishes to the extent reasonably ascertainable; and

(3) if the respondent's wishes are not reasonably ascertainable, advocate for the result that is the least restrictive alternative in type, duration, and scope, consistent with the respondent's interests.

[(c) The court shall appoint an attorney to represent a parent of a minor who is the subject of a proceeding under this [article] if:

(1) the parent objects to the entry of an order for a protective arrangement instead of guardianship or conservatorship;

(2) the court determines that counsel is needed to ensure that consent to the entry of an order for a protective arrangement is informed; or

(3) the court otherwise determines the parent needs representation.]

Legislative Note: *Subsection (c) is in brackets because some states have different policies regarding rights of parents in these cases.*

Comment

Alternative provisions are offered in subsection (a). Alternative A relies on the use of a "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of an attorney, nevertheless, is *required* under Alternative A when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor. Alternative A is in accord with the National Probate Court Standards. National Probate Court Standards, Standard 3.3.5 "Appointment of Counsel" (2013) provides:

> (a) Counsel should be appointed by the probate court to represent the respondent when:
> (1) requested by an unrepresented respondent;
> (2) recommended by a court visitor;
> (3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
> (4) otherwise required by law.
> (b) The role of counsel should be that of an advocate for the respondent.

It is expected that courts in states enacting Alternative A of subsection (a), will appoint counsel

in virtually all cases in which the respondent would otherwise be unrepresented. In such jurisdictions, courts should err on the side of protecting the respondent's rights and find, absent a compelling reason otherwise, that the respondent needs representation. Visitors in such jurisdictions also need to be sensitive to the fact that the respondent may lack the ability to knowingly waive appointment of counsel.

In light of these concerns and in the interest of providing full due process to respondents, states may wish to adopt Alternative B, which provides for mandatory appointment of counsel. Mandatory appointment has been strongly urged by the American Bar Association (A.B.A.) Commission on Law and Aging and helps ensure that the respondent's rights are fully represented and protected in the proceeding.

Subsection (b), which is new to the act, specifies the role of the attorney for the respondent, regardless of whether the state has chosen alternative A or B. It specifies that the attorney must make reasonable efforts to ascertain what the respondent wishes and must advocate for those wishes. This has the effect of directing the attorney to maintain a normal attorney-client relationship with the respondent. A.B.A. Model Rule of Professional Conduct 1.14, which is also applicable here, directs the attorney to maintain, as far as reasonably possible, a normal attorney-client relationship with a client of diminished capacity, and provides guidance on what may be done if maintaining a normal attorney-client relationship becomes difficult. Subsection (b) is also in accord with National Probate Court Standards, Standard 3.3.5 "Appointment of Counsel" (2013) with respect to the role of counsel.

Subsection (c), which is in brackets, gives states the option of creating a limited right to appointed counsel for parents whose minor children are the subject of a proceeding under Section 501. Subsection (c), if enacted, would require the court to appoint an attorney to represent such a parent if the parent objected to a protective arrangement instead of conservatorship, the parent appeared to be consenting to entry of an order for a protective arrangement instead of conservatorship but the court determined that counsel was needed to make sure that consent was informed, or the court otherwise determined that the parent needed counsel. Subsection (c) is designed not only to protect the interests of parents, but also to potentially empower parents to better protect the rights of their minor children. In determining whether to enact subsection (c), enacting jurisdictions should consider the substantial benefit of representation in protecting parents' fundamental rights and the important interest in parenting their own children.

Subsections (a) and (b) of this section mirror Section 305(a) and (b) and Section 406(a) and (b). Subsection (c) of this section mirrors Section 406(c).

SECTION 508. PROFESSIONAL EVALUATION.

(a) At or before a hearing on a petition under this [article] for a protective arrangement, the court shall order a professional evaluation of the respondent:

(1) if the respondent requests the evaluation; or

(2) or in other cases, unless the court finds that it has sufficient information to determine the respondent's needs and abilities without the evaluation.

(b) If the court orders an evaluation under subsection (a), the respondent must be examined by a licensed physician, psychologist, social worker, or other individual appointed by the court who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations and will not be advantaged or disadvantaged by a decision to grant the petition or otherwise have a conflict of interest. The individual conducting the evaluation promptly shall file a report in a record with the court. Unless otherwise directed by the court, the report must contain:

(1) a description of the nature, type, and extent of the respondent's cognitive and functional abilities and limitations;

(2) an evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(3) a prognosis for improvement, including with regard to the ability to manage the respondent's property and financial affairs if a limitation in that ability is alleged, and recommendation for the appropriate treatment, support, or habilitation plan; and

(4) the date of the examination on which the report is based.

(c) The respondent may decline to participate in an evaluation ordered under subsection (a).

Comment

A professional evaluation of the respondent is required in two circumstances. First, subsection (a)(1) mandates a professional evaluation when demanded by the respondent. When represented by counsel, the respondent may demand the evaluation through counsel. If the respondent is truly incapacitated and not represented by counsel, it is unlikely that the respondent will demand an evaluation. However, the court still can order a professional evaluation either on the visitor's recommendation or on its own motion.

Second, subsection (a)(2) mandates a professional evaluation in other cases unless the court explicitly finds it has sufficient information to determine both the respondent's needs and abilities without that evaluation. Consistent with this requirement, a court should order a professional evaluation any time the nature and scope of the respondent's abilities, limitations, and needs are not absolutely clear based on its own assessment and on the visitor's report. By providing the court with an expert evaluation of the respondent's abilities and limitations, the professional evaluation not only helps the court determine whether a protective arrangement is necessary, but also helps the court determine how to craft an appropriate order.

If an evaluation is ordered, subsection (b) requires that it be performed by a professional who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations. Assessing both abilities and limitations is important because an individual's functional needs will likely reflect the interaction between abilities and limitations. As part of the evaluation described in subsection (b), the professional evaluator should generally include a summary of any consultation with the respondent's treating physician.

Subsection (c) recognizes the right of the respondent to decline to participate in the evaluation. A respondent might so decline because of concern about undue invasion of privacy. However, if the respondent refuses participation, the court will have less information on which to base its conclusion. For respondents who oppose the proposed protective arrangement, this may be particularly problematic as the bulk of the court's information may end up being supplied by the petitioner.

Section 508 largely mirrors Sections 306 and 407.

SECTION 509. ATTENDENCE AND RIGHTS AT HEARING.

(a) Except as otherwise provided in subsection (b), a hearing under this [article] may not proceed unless the respondent attends the hearing. If it is not reasonably feasible for the respondent to attend a hearing at the location court proceedings typically are held, the court shall make reasonable efforts to hold the hearing at an alternative location convenient to the respondent or allow the respondent to attend the hearing using real-time audio-visual technology.

(b) A hearing under this [article] may proceed without the respondent in attendance if the court finds by clear-and-convincing evidence that:

(1) the respondent consistently and repeatedly has refused to attend the hearing after having been fully informed of the right to attend and the potential consequences of failing

to do so;

(2) there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance; or

(3) the respondent is a minor who has received proper notice and attendance would be harmful to the minor.

(c) The respondent may be assisted in a hearing under this [article] by a person or persons of the respondent's choosing, assistive technology, or an interpreter or translator, or a combination of these supports. If assistance would facilitate the respondent's participation in the hearing, but is not otherwise available to the respondent, the court shall make reasonable efforts to provide it.

(d) The respondent has a right to choose an attorney to represent the respondent at a hearing under this [article].

(e) At a hearing under this [article], the respondent may:

(1) present evidence and subpoena witnesses and documents;

(2) examine witnesses, including any court-appointed evaluator and the [visitor]; and

(3) otherwise participate in the hearing.

(f) A hearing under this [article] must be closed on request of the respondent and a showing of good cause.

(g) Any person may request to participate in a hearing under this [article]. The court may grant the request, with or without a hearing, on determining that the best interest of the respondent will be served. The court may impose appropriate conditions on the person's participation.

Comment

Subsection (a) provides that, except under the unusual circumstances set forth in subsection (b), no hearing on a petition for a protective arrangement instead of guardianship or conservatorship may proceed without the presence of the respondent. The fact that the respondent may not be able to attend the hearing at the location where the court normally conducts hearings does not justify holding the hearing without the respondent. Rather, the court must try to hold the hearing at a location that the respondent can attend or by using real-time, audio-visual technology. As a general matter, it is preferable to do the former, as in-person interactions will allow the court to observe the respondent's context, which can help the court to understand factors that may be influencing the respondent's behavior and communications. However, real-time, audio-visual technology can provide a reasonable alternative in appropriate situations if the technology allows both the court and respondent to communicate with one another to the best of their abilities.

The exceptions in subsection (b) to the requirement that the respondent must attend the hearing are deliberately very narrow. For the hearing to proceed without the respondent in attendance, the court must find at least one of three things by clear-and-convincing evidence.

The first exception is that the respondent consistently and repeatedly refused to attend the hearing despite being fully informed of the right to attend and potential consequences of not doing so. Thus, for example, a respondent who cannot physically access the courthouse where the hearing is scheduled must understand that she has a right to have the hearing held at an alternative location or by using real-time, audio-visual technology. The respondent should also understand that a guardian could be appointed for her in her absence, and that this appointment could strip her of the right to make important, personal decisions for herself. Among the responsibilities of the visitor in Section 506(d) is to explain the effect of the proceeding, the respondent's rights at the hearing, and the effect of the order sought.

The second exception is that there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance. Both parts of this requirement—that the respondent cannot practically attend and that the respondent cannot participate even with support—must be fully satisfied for this exception to apply. The exception should be used very sparingly as best practice is to hold the hearing in the presence of the respondent regardless of the respondent's abilities. Without the respondent's presence the court is relying on third-party information to determine that it is in fact not feasible for the respondent to attend and that the respondent is not being prevented from attending for some other reason. Especially where this information is presented by the petitioner, or does not include a professional evaluation, courts should be extremely hesitant to rely on it to excuse the respondent's presence.

The third exception is that the respondent is a minor who has received proper notice and attendance by the minor would be harmful to the minor.

The respondent has the right to take an active role in the hearing, as detailed in subsection (e). Subsection (c) recognizes that to exercise this right, the respondent may need assistance. It therefore provides that the respondent has a right to assistance at the hearing and places an

affirmative duty on the court to take reasonable measures to facilitate the respondent with receiving that assistance.

As indicated in subsection (d), the respondent has a right to choose an attorney to represent the respondent at the hearing. The respondent is free to choose an attorney other than the one who would otherwise be appointed by the court. This provision does not govern payment of the attorney. That issue is addressed in Section 119.

Under subsection (f), the respondent can request that the hearing be closed, but the court may grant the request only upon a showing of good cause.

Under subsection (g), others may make a request to participate, which can be granted by the court without a hearing, if the court finds that the respondent's best interest is served by the participation. The court's order granting the request to participate may include appropriate conditions or limitation.

This section mirrors Section 408, except insofar as Section 408 requires a proposed conservator to attend the hearing unless excused for good cause. Section 408, in turn, largely mirrors Section 307, except that it does not contain the additional exception for allowing the proceeding to occur without the respondent when the respondent is a minor.

SECTION 510. NOTICE OF ORDER. The court shall give notice of an order under this [article] to the individual who is subject to the protective arrangement instead of guardianship or conservatorship, a person whose access to the individual is restricted by the order, and any other person the court determines.

Comment

Section 510 requires the court to give notice of an order entered under Article 5 to the individual subject to the protective arrangement, any person whose access to the individual subject to the protective arrangement is restricted by the order, and any other person the court determines. The general notice provisions of Section 113 govern the form and timing of the notice.

SECTION 511. CONFIDENTIALITY OF RECORDS.

(a) The existence of a proceeding for or the existence of a protective arrangement instead of guardianship or conservatorship is a matter of public record unless the court seals the record after:

(1) the respondent, the individual subject to the protective arrangement, or the

parent of a minor subject to the protective arrangement requests the record be sealed; and

(2) either:

(A) the proceeding is dismissed;

(B) the protective arrangement is no longer in effect; or

(C) an act authorized by the order granting the protective arrangement has been completed.

(b) A respondent, an individual subject to a protective arrangement instead of guardianship or conservatorship, an attorney designated by the respondent or individual, a parent of a minor subject to a protective arrangement, and any other person the court determines are entitled to access court records of the proceeding and resulting protective arrangement. A person not otherwise entitled to access to court records under this subsection for good cause may petition the court for access. The court shall grant access if access is in the best interest of the respondent or individual subject to the protective arrangement or furthers the public interest and does not endanger the welfare or financial interests of the respondent or individual.

[(c) A report of a [visitor] or professional evaluation generated in the course of a proceeding under this [article] must be sealed on filing but is available to:

(1) the court;

(2) the individual who is the subject of the report or evaluation, without limitation as to use;

(3) the petitioner[, visitor,] and petitioner's and respondent's attorneys, for purposes of the proceeding;

(4) unless the court orders otherwise, an agent appointed under a power of attorney for finances in which the respondent is the principal;

(5) if the order is for a protective arrangement instead of guardianship and unless the court orders otherwise, an agent appointed under a [power of attorney for health care] in which the respondent is identified as the principal; and

(6) any other person if it is in the public interest or for a purpose the court orders for good cause.]

Legislative Note: *Subsection (c) is bracketed in recognition that states have different policies and procedures regarding the sealing of court records.*

Comment

Protective arrangements involve highly personal and other data whether the arrangement is in lieu of guardianship or is in lieu of conservatorship. It is important that the respondent's privacy be protected. Furthermore, data found in guardianship or conservatorship records, such as Social Security numbers and information concerning financial accounts, can be used to facilitate fraud. Concern about access by the general public has increased as electronic filing of court records has made these records more accessible.

On the other hand, public access is important. One criticism of guardianship and conservatorship in some states is that too much happens behind closed doors. The public, and "watch-dog" groups in particular, want to know how the guardianship and conservatorship system is functioning. In addition, this act encourages family and others interested in the welfare of the respondent to participate in the proceeding. Sections 504 and 505 working together require notice of the proceeding to be given to family and others whose participation might enhance the proceeding. In order for these persons to effectively monitor the protective arrangement, they need access to records. However, with the move to electronic filing and increasing concerns about protecting sensitive information, more courts are limiting access to guardianship or conservatorship records to the immediate parties and their counsel.

This section attempts to balance these conflicting policy concerns. Subsection (a) provides that the existence of a proceeding for a protective arrangement and the protective arrangement itself is a matter of public record. But even then, similar to the expungement of criminal records, the court has the authority to seal even the existence of the protective arrangement if the proceeding was dismissed, the protective arrangement is no longer in effect, or the actions authorized to be performed by the protective arrangement have been completed.

Subsection (b) addresses access to the underlying records of the protective arrangement. In addition to the individual and the individual's attorney, access is granted to a parent of a minor who is subject to a protective arrangement. Access is also granted to other persons the court determines, including persons whose access is in the best interest of the individual or in furtherance of the public interest and whose access does not endanger the welfare of financial interests of the individual.

The documents most likely to contain highly sensitive information are the visitor report under Section 506 and the professional evaluation under Section 508. Consequently, access to these documents is more restricted than other documents filed, which are covered by subsection (b). Pursuant to subsection (c), access to the visitor or evaluation report is available only to the court, the individual who is the subject of the proceeding and that individual's attorney, the petitioner and petitioner's attorney, and the visitor. Unless the court orders otherwise, access is also available to agents under powers of attorney for finances and, if the protective arrangement is in lieu of guardianship, to an agent under a power of attorney for health care. The court may also order notice to other persons if in the public interest or for other good cause. A partial or complete redaction of sensitive personal or financial information may be a practical solution for courts in balancing the need for disclosure to the public and the interests of family and friends, with the need to protect the individual's privacy and avoid misuse of sensitive data.

Because states vary considerably on their policies with regard to confidentiality in guardianship and conservatorship cases, subsection (c) has been placed in brackets, signaling that states are free to modify the language to match their local practice.

SECTION 512. APPOINTMENT OF [MASTER]. The court may appoint a [master] to assist in implementing a protective arrangement under this [article]. The [master] has the authority conferred by the order of appointment and serves until discharged by court order.

Legislative Note: *The term "master" is bracketed in recognition that states have different terms for this role.*

Comment

There may be times when it will be necessary, or simply advantageous, for the court to appoint a neutral party to help implement a protective arrangement under Article 5. The person appointed only has the authority conferred by the court in the order of appointment. Thus, the court order should specify the master's authority with respect to the particular transaction the court has approved. The person does not have the powers or duties of a guardian or conservator but only the powers or duties specific to the order.

[[ARTICLE] 6

FORMS

SECTION 601. USE OF FORMS. Use of the forms contained in this [article] is optional. Failure to use these forms does not prejudice any party.

Legislative note: *An enacting state may wish to modify a form in this article to best reflect state practice. The Appendix to this act includes sample orders that a court may use to deny or grant*

a guardianship, conservatorship, or protective arrangement instead of guardianship or conservatorship for an adult in accordance with this act.

Comment

The forms in this act are designed to make it easier for parties to comply with the requirements of the act, as well as to make it easier for parties to act in accordance with the spirit and goals of this act. In particular, the forms help ensure the petitioner will conduct the thorough needs analysis required by the act, and help the court implement the least restrictive alternative that will meet the needs of the respondent. No party should be prejudiced in any way for failure to use the forms provided under this act. As indicated in the legislative note, states may wish to modify certain aspects of these forms to reflect state practice.

SECTION 602. PETITION FOR GUARDIANSHIP FOR MINOR. This form may be used to petition for guardianship for a minor.

Petition for Guardianship for Minor

State of:
[County] of:
Name and address of attorney representing Petitioner, if applicable:

Note to Petitioner: This form can be used to petition for a guardian for a minor. A court may appoint a guardian for a minor who does not have a guardian if the court finds the appointment is in the minor's best interest, and: (1) the parents, after being fully informed of the nature and consequences of guardianship, consent; (2) all parental rights have been terminated; or (3) the court finds by clear-and-convincing evidence that the parents are unwilling or unable to exercise their parental rights.

1. Information about the person filing this petition (the "Petitioner").

a. Name:
b. Principal residence:
c. Current street address (if different):
d. Relationship to minor:
e. Interest in this petition:
f. Telephone number (optional):
h. Email address (optional):

2. Information about the minor alleged to need a guardian.

Provide the following information to the extent known.

a. Name:
b. Age:
c. Principal residence:
d. Current street address (if different):
e. If Petitioner anticipates the minor moving, or seeks to move the minor,

proposed new address:

f. Does the minor need an interpreter, translator, or other form of support to communicate with the court or understand court proceedings? If so, please explain.

g. Telephone number (optional):

h. Email address (optional):

3. Information about the minor's parent(s).

a. Name(s) of living parent(s):

b. Current street address(es) of living parent(s):

d. Does any parent need an interpreter, translator, or other form of support to communicate with the court or understand court proceedings? If so, please explain.

4. People who are required to be notified of this petition. State the name and current address of the people listed in Appendix A.

5. Appointment requested. State the name and address of any proposed guardian and the reason the proposed guardian should be selected.

6. State why Petitioner seeks the appointment. Include a description of the nature and extent of the minor's alleged need.

7. Property. If the minor has property other than personal effects, state the minor's property with an estimate of its value.

8. Other proceedings. If there are any other proceedings concerning the care or custody of the minor currently pending in any court in this state or another jurisdiction, please describe them.

9. Attorney(s). If the minor or the minor's parent is represented by an attorney in this matter, state the name, [telephone number, email address,] and address of the attorney(s).

SIGNATURE

_____ _____

Signature of Petitioner Date

_____ _____

Signature of Petitioner's Attorney if Petitioner is Represented by Counsel Date

APPENDIX A:
People whose name and address must be listed in Section 4 of this petition if they are not the Petitioner.

- The minor, if the minor is 12 years of age or older;

- Each parent of the minor or, if there are none, the adult nearest in kinship that can be found;
- An adult with whom the minor resides;
- Each person that had primary care or custody of the minor for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition;
- If the minor is 12 years of age or older, any person nominated as guardian by the minor;
- Any person nominated as guardian by a parent of the minor;
- The grandparents of the minor;
- Adult siblings of the minor; and

Any current guardian or conservator for the minor appointed in this state or another jurisdiction.

Comment

This section contains a form that may be used to petition for guardianship of a minor consistent with the requirements of Article 2.

SECTION 603. PETITION FOR GUARDIANSHIP, CONSERVATORSHIP, OR PROTECTIVE ARRANGEMENT. This form may be used to petition for:

(1) guardianship for an adult;

(2) conservatorship for an adult or minor;

(3) a protective arrangement instead of guardianship for an adult; or

(4) a protective arrangement instead of conservatorship for an adult or minor.

Petition for Guardianship, Conservatorship, or Protective Arrangement

State of:
[County] of:
Name and address of attorney representing Petitioner, if applicable:

Note to Petitioner: This form can be used to petition for a guardian, conservator, or both, or for a protective arrangement instead of either a guardianship or conservatorship. This form should not be used to petition for guardianship for a minor.

The court may appoint a guardian or order a protective arrangement instead of guardianship for an adult if the adult lacks the ability to meet essential requirements for physical health, safety, or self-care because (1) the adult is unable to receive and evaluate information or make or communicate decisions even with the use of supportive services, technological assistance, and supported decision-making, and (2) the adult's identified needs cannot be met by a less restrictive alternative.

The court may appoint a conservator or order a protective arrangement instead of conservatorship for an adult if (1) the adult is unable to manage property and financial affairs because of a limitation in the ability to receive and evaluate information or make or communicate decisions even with the use of supportive services, technological assistance, and supported decision making or the adult is missing, detained, or unable to return to the United States, and (2) appointment is necessary to avoid harm to the adult or significant dissipation of the property of the adult, or to obtain or provide funds or other property needed for the support, care, education, health, or welfare of the adult, or of an individual who is entitled to the adult's support, and protection is necessary or desirable to provide funds or other property for that purpose.

The court may appoint a conservator or order a protective arrangement instead of conservatorship for a minor if (1) the minor owns funds or other property requiring management or protection that cannot otherwise be provided; or (2) it would be in the minor's best interest, and the minor has or may have financial affairs that may be put at unreasonable risk or hindered because of the minor's age, or appointment is necessary or desirable to provide funds or other property needed for the support, care, education, health, or welfare of the minor.

The court may also order a protective arrangement instead of conservatorship that restricts access to an individual or an individual's property by a person that the court finds: (1) through fraud, coercion, duress, or the use of deception and control, caused, or attempted to cause, an action that would have resulted in financial harm to the individual or the individual's property; and (2) poses a serious risk of substantial financial harm to the individual or the individual's property.

1. Information about the person filing this petition (the "Petitioner").

a. Name:
b. Principal residence:
c. Current street address (if different):
d. Relationship to Respondent:
e. Interest in this petition:
f. Telephone number (optional):
g. Email address (optional):

2. Information about the individual alleged to need protection (the "Respondent").

Provide the following information to the extent known.

a. Name:
b. Age:
c. Principal residence:
d. Current street address (if different):
e. If Petitioner anticipates Respondent moving, or seeks to move Respondent, proposed new address:
f. Does Respondent need an interpreter, translator, or other form of support to communicate with the court or understand court proceedings? If so, please explain.

g. Telephone number (optional):
h. Email address (optional):

3. People who are required to be notified of this petition. State the name and address of the people listed in Appendix A.

4. Existing agents. State the name and address of any person appointed as an agent under a power of attorney for finances or [power of attorney for health care], or who has been appointed as the individual's representative for payment of benefits.

5. Action requested. State whether Petitioner is seeking appointment of a guardian, a conservator, or a protective arrangement instead of an appointment.

6. Order requested or appointment requested. If seeking a protective arrangement instead of a guardianship or conservatorship, state the transaction or other action you want the court to order. If seeking appointment of a guardian or conservator, state the powers Petitioner requests the court grant to a guardian or conservator.

7. State why the appointment or protective arrangement sought is necessary. Include a description of the nature and extent of Respondent's alleged need.

8. State all less restrictive alternatives to meeting Respondent's alleged need that have been considered or implemented. Less restrictive alternatives could include supported decision making, technological assistance, or the appointment of an agent by Respondent including appointment under a [power of attorney for health care] or power of attorney for finances. If no alternative has been considered or implemented, state the reason why not.

9. Explain why less restrictive alternatives will not meet Respondent's alleged need.

10. Provide a general statement of Respondent's property and an estimate of its value. Include any real property such as a house or land, insurance or pension, and the source and amount of any other anticipated income or receipts. As part of this statement, indicate, if known, how the property is titled (for example, is it jointly owned?).

11. For a petition seeking appointment of a conservator. (skip this section if not asking for appointment of a conservator)

a. If seeking appointment of a conservator with all powers permissible under this state's law, explain why appointment of a conservator with fewer powers (i.e., a "limited conservatorship") or other protective arrangement instead of conservatorship will not meet the individual's alleged needs.

b. If seeking a limited conservatorship, state the property Petitioner requests be placed under the conservator's control and any proposed limitation on the conservator's powers and duties.

c. State the name and address of any proposed conservator and the reason the proposed conservator should be selected.

d. If Respondent is 12 years of age or older, state the name and address of any person Respondent nominates as conservator.

e. If alleging a limitation in Respondent's ability to receive and evaluate information, provide a brief description of the nature and extent of Respondent's alleged limitation.

f. If alleging that Respondent is missing, detained, or unable to return to the United States, state the relevant circumstances, including the time and nature of the disappearance or detention and a description of any search or inquiry concerning Respondent's whereabouts.

12. For a petition seeking appointment of a guardian. (skip this section if not asking for appointment of a guardian)

a. If seeking appointment of a guardian with all powers permissible under this state's law, explain why appointment of a guardian with fewer powers (i.e., a "limited guardianship") or other protective arrangement instead of guardianship will not meet the individual's alleged needs.

b. If seeking a limited guardianship, state the powers Petitioner requests be granted to the guardian.

c. State the name and address of any proposed guardian and the reason the proposed guardian should be selected.

d. State the name and address of any person nominated as guardian by Respondent, or, in a will or other signed writing or other record, by Respondent's parent or spouse [or domestic partner].

13. Attorney. If Petitioner, Respondent, or, if Respondent is a minor, Respondent's parent is represented by an attorney in this matter, state the name, [telephone number, email address, and] address of the attorney(s).

SIGNATURE

_____ _____

Signature of Petitioner Date

_____ _____

Signature of Petitioner's Attorney if Petitioner is Represented by Counsel Date

APPENDIX A:
People whose name and address must be listed in Section 3 of this petition, if they are not the Petitioner.

- Respondent's spouse [or domestic partner], or if Respondent has none, any adult with whom Respondent has shared household responsibilities in the past six months;
- Respondent's adult children, or, if Respondent has none, Respondent's parents and adult siblings, or if Respondent has none, one or more adults nearest in kinship to Respondent who can be found with reasonable diligence;
- Respondent's adult stepchildren whom Respondent actively parented during the stepchildren's minor years and with whom Respondent had an ongoing relationship within two years of this petition;
- Any person responsible for the care or custody of Respondent;
- Any attorney currently representing Respondent;
- Any representative payee for Respondent appointed by the Social Security Administration;
- Any current guardian or conservator for Respondent appointed in this state or another jurisdiction;
- Any trustee or custodian of a trust or custodianship of which Respondent is a beneficiary;
- Any Veterans Administration fiduciary for Respondent;
- Any person Respondent has designated as agent under a power of attorney for finances;
- Any person Respondent has designated as agent under a [power of attorney for health care];
- Any person known to have routinely assisted the individual with decision making in the previous six months;
- Any person Respondent nominates as guardian or conservator; and
- Any person nominated as guardian by Respondent's parent or spouse [or domestic partner] in a will or other signed writing or other record.

Comment

This section contains a form that may be used to petition for: (1) a guardianship of an adult under Article 3 or a protective arrangement instead of such a guardianship under Article 5; (2) a conservatorship for either an adult or a minor under Article 4, or a protective arrangement instead of such a conservatorship under Article 5. This form addresses one of the key barriers to the limited guardianship: the fact that historically it has often been easier for petitioners to seek a full guardianship than a limited one. By showing petitioners how to request limited powers, and the justifications they must offer if seeking full powers, the form can help encourage petitioners to seek only those powers actually needed.

SECTION 604. NOTIFICATION OF RIGHTS FOR ADULT SUBJECT TO GUARDIANSHIP OR CONSERVATORSHIP. This form may be used to notify an adult subject to guardianship or conservatorship of the adult's rights under Sections 311 and 412.

Notification of Rights

You are getting this notice because a guardian, conservator, or both have been appointed for you.

It tells you about some important rights you have. It does not tell you about all your rights. If you have questions about your rights, you can ask an attorney or another person, including your guardian or conservator, to help you understand your rights.

General rights:
You have the right to exercise any right the court has not given to your guardian or conservator. You also have the right to ask the court to:

- end your guardianship, conservatorship, or both;
- increase or decrease the powers granted to your guardian, conservator, or both;
- make other changes that affect what your guardian or conservator can do or how they do it; and
- replace the person that was appointed with someone else.

You also have a right to hire an attorney to help you do any of these things.

Additional rights for persons for whom a guardian has been appointed:
As an adult subject to guardianship, you have a right to:
(1) be involved in decisions affecting you, including decisions about your care, where you live, your activities, and your social interactions, to the extent reasonably feasible;
(2) be involved in decisions about your health care to the extent reasonably feasible, and to have other people help you understand the risks and benefits of health-care options;
(3) be notified at least 14 days in advance of a change in where you live or a permanent move to a nursing home, mental-health facility, or other facility that places restrictions on your ability to leave or have visitors, unless the guardian has proposed this change in the guardian's plan or the court has expressly authorized it;
(4) ask the court to prevent your guardian from changing where you live or selling or surrendering your primary dwelling by [insert process for asking the court to prevent such a move];
(5) vote and get married unless the court order appointing your guardian states that you cannot do so;
(6) receive a copy of your guardian's report and your guardian's plan; and
(7) communicate, visit, or interact with other people (this includes the right to have visitors, to make and receive telephone calls, personal mail, or electronic communications) unless:

- your guardian has been authorized by the court by specific order to restrict these communications, visits, or interactions;
- a protective order is in effect that limits contact between you and other people; or
- your guardian has good cause to believe the restriction is needed to protect you from significant physical, psychological, or financial harm and the restriction is for not more than seven business days if the person has a family or pre-existing social relationship with you or not more than 60 days if the person does not have that kind of relationship with you.

Additional rights for persons for whom a conservator has been appointed:
As an adult subject to conservatorship, you have a right to:
(1) participate in decisions about how your property is managed to the extent feasible; and
(2) receive a copy of your conservator's inventory, report, and plan.]

Comment

This section provides a form that courts and guardians or conservators can use to notify adults subject to guardianship or conservatorship of key rights retained by the adult. The notice is drafted using plain and easy-to-understand language that complies with Section 113. Its inclusion thus reduces the potential burden of the act's notice requirements. However, the form by itself will not be adequate to provide meaningful notice to those who are not proficient in English, who are illiterate, or who have very limited literacy.

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

The Uniform Electronic Transactions Act (UETA) was approved by the Uniform Law Commission in 1999 to give legal effect to electronic signatures when parties agree to communicate electronically. In 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act ("E-SIGN") for the same purpose. E-SIGN contains a provision stating that the federal law will not preempt a state's enactment of UETA or any other state law authorizing electronic transactions enacted after 2000 that makes specific reference to the federal law. This section fulfills the specific-reference requirement of E-SIGN and ensures the state's adoption of provisions in this uniform act involving electronic signatures will not be preempted by federal law.

SECTION 703. APPLICABILITY. This [act] applies to:

(1) a proceeding for appointment of a guardian or conservator or for a protective

arrangement instead of guardianship or conservatorship commenced after [the effective date of this [act]]; and

(2) a guardianship, conservatorship, or protective arrangement instead of guardianship or conservatorship in existence on [the effective date of this [act]] unless the court finds application of a particular provision of this [act] would substantially interfere with the effective conduct of the proceeding or prejudice the rights of a party, in which case the particular provision of this [act] does not apply and the superseded law applies.

Comment

The provisions of this act apply to all proceedings for guardianships, conservatorships, and protective arrangements commenced after the effective date, and also to pre-existing guardianships, conservatorships, and other protective arrangements unless a court determines application of a state's prior law on the subject would be more equitable.

[SECTION 704. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

SECTION 705. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

SECTION 706. EFFECTIVE DATE. This [act] takes effect . . . .